No. 17-1184	
Title:	**Michael J. Biestek, Petitioner** **v.** **Nancy A. Berryhill, Acting Commissioner of Social Security**
Docketed:	February 23, 2018
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Numbers:	(17-1459)
Decision Date:	December 27, 2017
Questions Presented	
DATE	**PROCEEDINGS AND ORDERS**
Feb 21 2018	Pursuant to Rule 34.6 and Paragraph 9 of the Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System, filings in this case should be submitted in paper form only, and should not be submitted through the Court's electronic filing system.
Feb 21 2018	Petition for a writ of certiorari filed. (Response due March 26, 2018) **Petition Certificate of Word Count Proof of Service**
Mar 20 2018	Motion to extend the time to file a response from March 26, 2018 to April 25, 2018, submitted to The Clerk.
Mar 21 2018	Motion to extend the time to file a response is granted and the time is extended to and including April 25, 2018.
Apr 20 2018	Motion to extend the time to file a response is granted and the time is further extended to and including May 14, 2018.
Apr 20 2018	Motion to extend the time to file a response from April 25,

	2018 to May 14, 2018, submitted to The Clerk.
May 14 2018	Brief of respondent Nancy A. Berryhill, Deputy Commissioner for Operations, Social Security Administration in opposition filed. **Main Document** **Proof of Service**
May 21 2018	Reply of petitioner Michael J. Biestek filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 22 2018	DISTRIBUTED for Conference of 6/7/2018.
Jun 11 2018	DISTRIBUTED for Conference of 6/14/2018.
Jun 18 2018	DISTRIBUTED for Conference of 6/21/2018.
Jun 25 2018	Petition GRANTED.
Jun 25 2018	As Rule 34.6 provides, "If the Court schedules briefing and oral argument in a case that was governed by Federal Rule of Civil Procedure 5.2(c) or Federal Rule of Criminal Procedure 49.1(c), the parties shall submit electronic versions of all prior and subsequent filings with this Court in the case, subject to [applicable] redaction rules." Subsequent party and amicus filings in the case should now be submitted through the Court's electronic filing system, with any necessary redactions.
Jul 13 2018	Joint motion to extend the time to file the opening briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 27, 2018. The time to file respondent's brief on the merits is extended to and including October 15, 2018.
Jul 13 2018	Joint motion for an extension of time to file the opening briefs on the merits filed. **Main Document**
Aug 03 2018	Motion to dispense with printing the joint appendix filed by petitioner Michael J. Biestek.

	Main Document **Proof of Service**
Aug 03 2018	Blanket Consent filed by Petitioner, Michael J. Biestek **Blanket Consent**
Aug 27 2018	Brief of petitioner Michael J. Biestek filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Sep 04 2018	Brief amici curiae of National Organization of Social Security Claimants' Representatives, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 04 2018	Brief amicus curiae of National Association of Disability Representatives filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 01 2018	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Oct 09 2018	SET FOR ARGUMENT on Tuesday, December 4, 2018
Oct 15 2018	Record received from the U.S.C.A. 6th Circuit.
Oct 15 2018	Brief of Nancy A. Berryhill, Deputy Commissioner for Operations, Social Security Administration not accepted for filing. (Revised brief submitted - 10/16/18)
Oct 15 2018	Brief of respondent Nancy A. Berryhill, Deputy Commissioner for Operations, Social Security Administration filed. (10/16/18) **Main Document**
Oct 19 2018	CIRCULATED
Nov 14 2018	Reply of petitioner Michael J. Biestek filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

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No. _____

IN THE
Supreme Court of the United States

MICHAEL J. BIESTEK,
Petitioner,

v.

COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When assessing an applicant's eligibility for social security benefits on the basis of a disability, an administrative law judge ("ALJ") must determine whether the applicant "can make an adjustment to other work." 20 C.F.R. § 404.1520(a)(4)(v). This determination must be supported by substantial evidence. *See* 42 U.S.C. § 405(g). In making the determination, an ALJ is authorized to call a vocational expert to testify about other work available to an applicant. *See* 20 C.F.R. § 404.1566(e). These assessments occur hundreds of thousands of times annually.

The question presented is:

Whether a vocational expert's testimony can constitute substantial evidence of "other work," 20 C.F.R. § 404.1520(a)(4)(v), available to an applicant for social security benefits on the basis of a disability, when the expert fails upon the applicant's request to provide the underlying data on which that testimony is premised.

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PETITION FOR A WRIT OF CERTIORARI

Michael J. Biestek petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The decision of the Sixth Circuit (Pet. App. 1a) is reported at 880 F.3d 778 (6th Cir. 2017). The decision of the district court (Pet. App. 25a) is unreported.

JURISDICTION

The judgment of the Sixth Circuit was entered on December 27, 2017.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 405(b)(1) provides:

> Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure.

42 U.S.C. § 405(g) provides:

> The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive.

20 C.F.R. § 404.1520(a)(4)(v) provides:

> At the fifth and last step, we consider our assessment of your residual functional capacity and your age, education, and work experience to

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[1] The district court had jurisdiction over this case pursuant to 42 U.S.C. § 405(g).

see if you can make an adjustment to other work. If you can make an adjustment to other work, we will find that you are not disabled. If you cannot make an adjustment to other work, we will find that you are disabled.

INTRODUCTION

A person is not eligible for social security disability benefits if the person can "make an adjustment to other work." 20 C.F.R. § 404.1520(a)(4)(v). This case presents the question whether the Social Security Administration may permissibly deny benefits based on only a vocational expert's testimony that "other work" exists, when the vocational expert refuses to disclose the data underlying that testimony. There is a well-established, and entrenched, conflict among the circuits on this question, and this case presents the ideal vehicle for this Court to resolve the issue.

Applications for social security benefits on the basis of disability are first reviewed by either an employee of the relevant state agency or an employee of the Social Security Administration ("SSA").[2] 20 C.F.R. §§ 404.1503(a)–(b), 416.903(a)–(b). If an application is denied, the applicant may request reconsideration. 20 C.F.R. §§ 404.907, 416.1407. If the application is denied again upon reconsideration, the applicant may request review by an administrative law judge ("ALJ"). 20 C.F.R. §§ 404.929, 416.1414. The ALJ must make factual

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[2] This petition will use the term "social security benefits" to refer to both Social Security Disability Income, *see* 42 U.S.C. § 423(a), and Supplemental Security Income, *see* 42 U.S.C. § 1381(a). For the purposes of the question presented, the distinctions between the two programs are immaterial.

findings regarding an applicant's eligibility for social security benefits pursuant to a five-step process laid out in 20 C.F.R. § 404.1520(a)(4) and repeated in 20 C.F.R. § 416.920(a)(4). Each of these findings must be supported by substantial evidence. *See* 42 U.S.C. § 405(g). Under the fifth of these steps, the ALJ must determine whether the applicant "can make an adjustment to other work." 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). To make this finding, ALJs may rely on vocational experts who testify regarding jobs that would be available to an applicant given the applicant's disability, age, education, and work experience. 20 C.F.R. §§ 404.1566(e), 416.966(e).

Petitioner Michael Biestek applied for social security benefits on the basis of disability in light of a severe, and disabling, physical impairment. Pet. App. 3a. During a hearing before an ALJ, a vocational expert testified regarding various jobs that would have been available to Mr. Biestek notwithstanding his disability. Pet. App. 116a-117a. When requested by Mr. Biestek, the vocational expert declined to produce the data and analyses underlying her conclusions, citing "the confidentiality of her files." Pet. App. 20a, 118a-119a. The ALJ refused to require the expert to produce this information, even in a redacted form. Pet. App. 20a, 118a-119a. The ALJ then denied Mr. Biestek disability benefits for the full time-period specified in his application, finding based on only the expert's testimony that Mr. Biestek could have secured certain forms of employment for a limited period of time. Pet. App. 78a-79a, 109a-110a.

Reviewing the ALJ's findings for substantial evidence, The Sixth Circuit affirmed the ALJ. Pet. App. 24a. In its decision, the court recognized that it was ruling on a question over which there was "a divide . . . between the Seventh Circuit and several other circuits that have staked a position." Pet. App. 20a. In ruling that "substantial evidence" supported the ALJ's finding of other work available to Mr. Biestek, despite the expert's refusal to produce any data whatsoever substantiating her conclusion, the Sixth Circuit joined the Second and Ninth Circuits. *See* Pet. App. 21a-22a; *Brault v. Soc. Sec. Admin., Comm'r*, 683 F.3d 443, 450-51 (2d Cir. 2012); *Bayliss v. Barnhart*, 427 F.3d 1211, 1217-18 (9th Cir. 2005). The Seventh Circuit has held directly to the contrary: a vocational expert's testimony cannot constitute substantial evidence of other work available to a social security benefits applicant if the expert fails to produce on demand any data underlying the expert's conclusions. *See McKinnie v. Barnhart*, 368 F.3d 907, 911 (7th Cir. 2004) (per curiam); *Donahue v. Barnhart*, 279 F.3d 441, 446-47 (7th Cir. 2002).

As the number of cases addressing this question demonstrates, the issue arises frequently because the § 404.1520(a)(4)(v) determination must be made in hundreds of thousands of cases each year before an applicant receives social security benefits on the basis of a disability. *See* Soc. Sec. Admin., SSA Pub. No. 13-11826, *Annual Statistical Report on the Social Security Disability Insurance Program, 2016* tbl. 65 (Oct. 2017) (finding that from 1999 to 2015, 30-40% of all medical-based denials of benefits, of which there are hundreds of thousands, were based on the applicant's ability to do other types of work) (hereinafter "SSA Data"),

http://www.ssa.gov/policy/docs/statcomps/di_asr/2016/di_asr16.pdf. This issue is also important, as an adverse ruling automatically renders an applicant ineligible for valuable government benefits. This circuit split, therefore, frustrates the fair and uniform distribution of federal benefits.

This case is a clean vehicle for resolving this question. The facts are undisputed. The Sixth Circuit squarely held as a matter of law that the vocational expert's testimony—absent any of the underlying data Mr. Biestek requested—could constitute substantial evidence of other work available to Mr. Biestek under § 404.1520(a)(4)(v). Had Mr. Biestek's case arisen in the Seventh rather than the Sixth Circuit, the case would have come out the other way. Indeed, the Sixth Circuit expressly identified the conflict among the circuits in its decision.

The petition for certiorari should be granted.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

Under the Social Security Act, individuals with a qualifying disability may receive supplemental security income ("SSI") if they present sufficient financial need, 42 U.S.C. § 1382(a), and social security disability insurance ("SSDI") if they have worked for a designated period of time and paid sufficient Social Security taxes on their income, 42 U.S.C. § 423(a).

To be eligible for either form of social security benefits on the basis of disability, the applicant must be unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental

impairment" that is expected to result in death or last for at least twelve continuous months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). This requirement includes an inability to perform both the applicant's prior work and any work that exists in significant numbers nationally or in the applicant's region, taking into consideration the applicant's age, education, and work experience. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Initial responsibility for determining eligibility rests with either the relevant state agency authorized to make disability determinations or the Social Security Administration. 20 C.F.R. §§ 404.1503(a)–(b), 416.903(a)–(b). An applicant who receives an adverse determination may appeal the determination by, first, petitioning for reconsideration, 20 C.F.R. §§ 404.907, 416.1407; second, seeking a hearing before an administrative law judge, 20 C.F.R. §§ 404.929, 416.1414; third, requesting review by the SSA Appeals Council, 20 C.F.R. §§ 404.967, 416.1467; and fourth, seeking judicial review, *see* 42 U.S.C. § 405(g); 20 C.F.R. §§ 404.981, 416.1481.

Pursuant to 20 C.F.R. § 404.1520(a)(4) for SSDI and 20 C.F.R. § 416.920(a)(4) for SSI, an individual must satisfy a "five-step sequential evaluation process" to qualify for social security benefits on the basis of a disability. First, the applicant must not be engaged in any substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). Second, the applicant must have a severe medically determinable physical or mental impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). Third, if the applicant's impairments meet or equal one of the impairments listed in Appendix 1 of the regulation, the

applicant is disabled and eligible for benefits. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the applicant's impairments do not satisfy the third step, the applicant must satisfy two additional requirements. Fourth, the applicant's impairments must render the applicant unable to perform their prior work. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). And, fifth, the applicant must be unable, based on the applicant's impairments, age, education, and work experience, to adjust to another readily available profession. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *see* 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (defining "work" for disability determinations as only "work which exists in significant numbers either in the region where such individual lives or in several regions in the country").

The burden of proof lies with the applicant for the first four steps, but the burden shifts to the Commissioner for the fifth. *See Brault*, 683 F.3d at 445; *Bauzo v. Bowen*, 803 F.2d 917, 923 (7th Cir. 1986); *Allen v. Califano*, 613 F.2d 139, 145 (6th Cir. 1980). While the ALJ may consider evidence otherwise inadmissible in a court of law, *see* 42 U.S.C. § 405(b)(1), all of the ALJ's factual findings must be supported by substantial evidence regardless of admissibility, 42 U.S.C. § 405(g).

If an applicant satisfies the five steps, then the applicant is disabled and may be eligible for SSDI under 42 U.S.C. § 423 and for SSI under 42 U.S.C. § 1381a.[3]

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[3] This year, based on cost-of-living adjustments, SSI is $750 per month, minus certain amounts of the individual's income, 20 C.F.R. § 416.410. Soc. Sec. Admin., *SSI Federal Payment Amounts For 2018*, http://www.ssa.gov/oact/cola/SSI.html (last visited Feb. 13,

Failure on any of these steps, except for step three, renders the applicant ineligible for social security benefits on the basis of disability.

B. Factual Background

Petitioner Michael Biestek worked for most of life as a carpenter and laborer, building scaffolding on construction sites. Pet. App. 3a, 109a. In June 2005 he became unemployed, and has remained unemployed since because of lower back pain caused by a degenerative disc disease, depression, and Hepatitis C. Pet. App. 3a.

In March 2010, Mr. Bietsek applied for social security benefits, alleging that his disability commenced on October 28, 2009. Pet. App. 3a. His application was denied by the SSA and by an ALJ that reviewed his application. Pet. App. 3a. The Appeals Council denied review. Pet. App. 3a. Mr. Biestek sought district court review of the ALJ's decision. Pet. App. 3a. The district court vacated and remanded the denial of Mr. Biestek's application, finding the ALJ had failed to procure necessary medical opinions and had made an improper assumption regarding the vocational expert's testimony. Pet. App. 3a.

On remand, the ALJ denied Mr. Biestek's application for benefits from October 28, 2009, his alleged onset date, to May [redacted] 2013, finding that Mr. Biestek had "the residual functional capacity to perform sedentary work" with several limitations, and that such work was readily

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2018). The amount of an individual's SSDI benefit is based on the amount of income upon which the individual had paid Social Security taxes.

available. Pet. App. 89a-90a, 109a-110a. The ALJ found, however, that Mr. Biestek was eligible for disability benefits beginning on May [redacted] 2013, when his advanced age seriously impacted his ability to adjust to other work. Pet. App. 112a; *see* 20 C.F.R. §§ 404.1563(d), 416.963(d). In determining that Mr. Biestek could have found alternate employment from October 28, 2009, to May [redacted] 2013, the ALJ relied solely on the testimony of a vocational expert. Pet. App. 111a-112a. The expert opined that Mr. Biestek "would have been able to perform the requirements of representative sedentary unskilled occupations," such as a bench assembler, with 240,000 jobs nationally and 6,000 jobs in Southeast Michigan, and a sorter, with 120,000 jobs nationally and 1,500 jobs in Southeast Michigan. Pet. App. 111a, 116a. The expert further opined that such jobs were available to Mr. Biestek despite his additional limitations "based on her knowledge and experience of the job market in Southeastern Michigan." Pet. App. 111a; *see also* Pet. App. 117a (testifying that her estimate of jobs available to Mr. Biestek despite his additional severe limitations "is based on [her] professional experience").

Before the ALJ, Mr. Biestek questioned the accuracy of the vocational expert's opinion, and requested that the expert produce the job analyses and labor market surveys she had relied upon to reach her conclusions on each job's requirements and availability. Pet. App. 117a-119a. The vocational expert refused to provide this data in any form, citing the confidentiality of her files. Pet. App. 118-119a. Instead, she claimed her opinion could be relied upon based solely on her "professional experience" and the Department of Labor's *Dictionary of Occupational Titles*, which does not address any of

Mr. Biestek's additional limitations and which defines various types of jobs but provides no data on their current availability in regions throughout the country. *See* Pet. App. 117a. The ALJ refused to require the expert to provide the relied-upon data, even in redacted form, Pet. App. 118a-119a, and found that significant numbers of positions were available to Mr. Biestek from October 28, 2009, to May [redacted] 2013, based on the expert's testimony alone. Pet. App. 109a-110a.

Reviewing the ALJ's findings for substantial evidence, the district court affirmed. Pet. App. 33a. The court found, as a matter of law, that the ALJ was entitled to rely solely on the vocational expert's testimony to find substantial evidence of jobs available to Mr. Biestek, notwithstanding the expert's refusal to provide any of the data underlying that testimony. Pet. App. 28a-30a.

The Sixth Circuit affirmed, recognizing that it was ruling on a question over which there was "a divide . . . between the Seventh Circuit and several other circuits that have staked a position." Pet. App. 20a. Quoting the Second Circuit's observation that the Seventh Circuit's rule "has not been a popular export," Pet. App. 21a (quoting *Brault*, 683 F.3d at 449), the Sixth Circuit joined the Second and Ninth Circuits, holding that there exists no "oblig[ation for] vocational experts to provide the data and reasoning used in support of their conclusions upon request." Pet. App. 21a. *See Brault*, 683 F.3d at 449; *Bayliss*, 427 F.3d at 1217-18. *But see Donahue*, 279 F.3d at 446; *McKinnie*, 368 F.3d at 910-11.

The Sixth Circuit found that in 42 U.S.C. § 405(b)(1), "Congress specifically exempted Social Security

disability proceedings from the strictures of the Federal Rules of Evidence, allowing ALJs to consider a broader range of potentially relevant information than would be admissible in an ordinary court of law." Pet App. 21a. *See* 42 U.S.C. § 405(b)(1) ("Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure."). Yet, the Court held, requiring a vocational expert to produce the data underlying his or her opinion would "effectively import a key provision of the Federal Rules of Evidence into Social Security proceedings." Pet. App. 21a. The Sixth Circuit also rejected the Seventh Circuit's rule that vocational experts must produce the data supporting their conclusions because the Sixth Circuit found "little clarity on how to apply the *Donahue* and *McKinnie* standards." Pet. App. 22a.

The Court observed that while "vocational expert testimony that is 'conjured out of whole cloth' cannot be considered substantial evidence," here Mr. Biestek "aired his concerns to the ALJ who accepted the vocational expert's testimony over his objections." Pet. App. 22a (quoting *Donahue*, 279 F.3d at 446). The Sixth Circuit thus concluded "the ALJ's acceptance of [the vocational expert's] testimony cannot be said to have been improper." Pet. App. 23a (alteration in original) (quoting *Sias v. Sec'y of Health & Human Servs.*, 861 F.2d 475, 481 (6th Cir. 1988)).

REASONS FOR GRANTING THE WRIT

This case presents the ideal vehicle for this Court to resolve an acknowledged and entrenched conflict among the circuits on an important and frequently recurring

legal issue that arises in hundreds of thousands of social security ALJ proceedings annually. *See* SSA Data at tbl. 63. If Mr. Biestek's case had arisen in the Seventh Circuit, the vocational expert's testimony would not have constituted substantial evidence of the "other work," 20 C.F.R. § 404.1520(a)(4)(v), available to Mr. Biestek, once the vocational expert refused upon request to provide any data or analysis supporting her conclusions. Because his case arose in the Sixth Circuit—as it would were it to have arisen in the Second or Ninth Circuits—the expert's challenged testimony alone did constitute substantial evidence.

This circuit conflict has existed for over fifteen years, and further percolation is unnecessary. There is no justification for the current geographic discrepancy in how ALJs assess vocational expert testimony in the hundreds of thousands of social security benefits proceedings in which vocational experts testify annually, and this Court's review is warranted.

The petition for certiorari should be granted.

I. THERE IS AN ACKNOWLEDGED CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

As the Sixth Circuit acknowledged in ruling against Mr. Biestek, its decision was squarely in conflict with rulings of the Seventh Circuit and in agreement with decisions from the Second and Ninth Circuits. Pet. App. 20a.

A. The Seventh Circuit Requires Vocational Experts to Produce Upon Request the Data Underlying Their Opinions Regarding "Other Work" Available to an Applicant.

In *McKinnie v. Barnhart*, 368 F.3d 907, 911 (7th Cir. 2004), a vocational expert testified that notwithstanding an applicant's disability, the applicant could perform various specific jobs, several thousand of which existed in the applicant's region. *Id.* at 909. When challenged by the applicant's lawyer to "show us how you arrived at [your] figure[s]," the expert stated that she used her "personal labor market surveys" to extrapolate the numbers from other data. Pet. App. 120a. The applicant's lawyer asked for the personal labor market surveys to be included in the record. Pet. App. 120a. Despite the expert's willingness, the ALJ found the expert need not supplement the record with the data and references she had relied upon in reaching her conclusions unless the applicant compensated the expert for her time. *See* Pet. App. 120a-121a; *McKinnie*, 368 F.3d at 909. The record was never supplemented, and based on the expert's unsupported testimony the ALJ found substantial evidence of other work available to the applicant. *McKinnie*, 368 F.3d at 909.

In vacating the ALJ's decision, the Seventh Circuit observed, "the standards by which an expert's reliability is measured may be less stringent at an administrative hearing than under the Federal Rules of Evidence." *Id.* at 910. Nonetheless, "because an ALJ's findings must be supported by substantial evidence, an ALJ may depend upon expert testimony only if the testimony is reliable." *Id.* Thus, the Seventh Circuit held "[a] vocational expert

is 'free to give a bottom line,' but the data and reasoning underlying that bottom line *must* be 'available on demand' if the claimant challenges the foundation of the vocational expert's opinions." *Id.* at 911 (quoting *Donahue*, 279 F.3d at 446) (emphasis added). Recognizing "[i]t is the Commissioner's burden at Step 5 to establish the existence of a significant number of jobs that the claimant can perform," the court found no reason an applicant "should pay a vocational expert to do the preparatory research that she should have completed prior to testifying." *Id.* "The data and reasoning underlying a vocational expert's opinions are not 'available on demand,'" as the court found they must be, "if the [applicant] must pay for them." *Id.* Because the expert had not made available the data underlying her conclusions, the Seventh Circuit found the ALJ could not rely upon those conclusions as substantial evidence on the step five inquiry and vacated and remanded the ALJ's decision. *Id.*

In so ruling, the Seventh Circuit reaffirmed the rule of its prior decision in *Donahue*, 279 F.3d at 446. There, Judge Easterbrook writing for the court observed "[e]vidence is not 'substantial' if vital testimony has been conjured out of whole cloth." *Donahue*, 279 F.3d at 446. Thus, "an expert is free to give a bottom line, provided that the underlying data and reasoning are available on demand."[4] *Id.*

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[4] In *Donahue*, the Seventh Circuit affirmed the ALJ's denial of supplemental security income because the applicant had not challenged the vocational expert's conclusions, or requested the data underlying them before the ALJ. 279 F.3d at 446-47.

B. The Second, Sixth, and Ninth Circuits Do Not Require Vocational Experts to Produce Upon Request the Data Underlying Their Opinions Regarding "Other Work" Available to an Applicant.

In the decision below, the Sixth Circuit held that substantial evidence supported the ALJ finding that other jobs were available to Mr. Biestek, based solely on a vocational expert's unsupported testimony and notwithstanding the expert's failure to provide the data—namely, personally conducted labor market surveys and job analyses—underlying that testimony when requested. Pet. App. 20a-22a, 117a-119a. That decision squarely conflicts with the rule in the Seventh Circuit, and is consistent with the rule in Second and Ninth Circuits.

In *Brault v. Social Security Administration, Commissioner*, 683 F.3d 443 (2d Cir. 2012), an applicant challenged a vocational expert's estimate of the number of jobs available to the applicant notwithstanding his disability. In providing this estimate, the expert had relied upon one source—the Labor Department's *Dictionary of Occupational Titles* ("DOT")—to identify potential jobs available to the applicant, but on a different source—*The Occupational Employment Quarterly II*—to identify the number of jobs available to the applicant in Vermont, where he lived. *Id.* at 446-47. The applicant argued that these two sources of data contained different job definitions, and thus that the expert could not opine on available jobs by merging the two. *Id.* The expert did not provide any data or analysis underlying his conclusions, and instead claimed that he

counted only "jobs . . . that I know exist." *Id.* at 447 (quotation marks omitted). The ALJ did not respond to the applicant's objections, did not demand the underlying data from which the expert based his conclusions, and instead issued a decision relying on the vocational expert's testimony and agreeing that the positions the expert had identified were available in the numbers the expert had given. *Id.*

On appeal to the Second Circuit, the applicant argued that "once [the vocational expert's] testimony had been challenged, the ALJ was *required*: . . . to grant an opportunity to inspect and challenge the proffered evidence[.]" *Id.* at 448. Recognizing that this was an issue over which there exists "a split among our sister circuits," the court criticized the Seventh Circuit for "acknowledg[ing] in *Donahue* that ALJs are not bound by the Rules of Evidence, but then turn[ing] around and requir[ing] ALJs to hew so closely to *Daubert's* principles." *Id.* at 449. Citing its own precedent, the Court also noted "the marked absence of any 'applicable regulation or decision of this Court requiring a vocational expert to identify with greater specificity the source of his figures or provide supporting documentation.'" *Id.* at 450 (quoting *Galiotti v. Astrue*, 266 F. App'x 66 (2d Cir. 2008) (summary order)).

The Second Circuit found the ALJ had considered the applicant's challenge to the vocational expert's testimony because the applicant's counsel had been afforded the opportunity on cross-examination to "explore the limitations of the . . . mapping methodology" the expert must have used to reach a conclusion despite using two inconsistent sources. *Id.* at

451. The Second Circuit clarified that it was "*not* hold[ing] that an ALJ *never* need question reliability." *Id.* at 450. Nonetheless, the Second Circuit held the ALJ could rely on only the vocational expert's testimony in finding substantial evidence of other work available to the applicant, even when the expert produced none of the data or analyses underlying his conclusions. *Id.* at 450-51.

The Sixth Circuit's decision is also consistent with the Ninth Circuit's decision in *Bayliss v. Barnhart*, 427 F.3d 1211 (9th Cir. 2005), to reject the Seventh Circuit's rule. In *Bayliss*, an applicant challenged an ALJ's reliance on a vocational expert's testimony regarding the relevant number of other jobs that existed in the national economy notwithstanding the applicant's disability. *Id.* at 1218. In rejecting this challenge, the Ninth Circuit held "[a vocational expert's] recognized expertise provides the necessary foundation for his or her testimony. Thus, no additional foundation is required." *Id.* Unlike the Seventh Circuit, therefore, which does not permit an ALJ to rely upon a vocational expert's unsupported testimony once that testimony is challenged and the data underlying it is requested, in the Ninth Circuit a vocational expert's testimony alone constitutes substantial evidence of the § 404.1520(a)(4)(v) factor.[5]

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[5] Indeed, some district courts in the Ninth Circuit have gone even further and read *Bayliss* as holding that a vocational expert's testimony is *per se* reliable because of the expert's recognized expertise, even in the face of contrary evidence. *See Early v. Colvin*, No. 3:14-CV-06015-DWC, 2015 WL 4231598, at *8 (W.D.

Finally, in an unpublished opinion, the Third Circuit indicated that it, too, was likely to reject the Seventh Circuit's rule. In *Welsh v. Commissioner Social Security*, 662 F. App'x 105 (3d Cir. 2016), the Third Circuit noted that it had not yet adopted the *Donahue* rule "with good reason." *Id.* at 109–10. Yet, because the petitioner failed to question the basis of the vocational expert's testimony, *id.* at 109, the Court never decided whether a vocational expert must provide evidence if questioned by opposing counsel or the ALJ.

* * *

Had Mr. Biestek's case arisen in the Seventh Circuit, the ALJ would not have been permitted to find substantial evidence of other work available to Mr. Biestek based solely on the vocational expert's

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Wash. July 10, 2015) (finding under *Bayliss* that even assuming applicant did not waive challenge, ALJ was entitled to rely solely on vocational expert's testimony despite applicant's contradicting evidence on number of available jobs, because the vocational expert's "recognized expertise provides the necessary foundation for his or her testimony" (quoting *Bayliss*, 427 F.3d at 1217-18)); *Merryflorian v. Astrue*, No. 12-CV-2493-IEG (DHB), 2013 WL 4783069, at *6 (S.D. Cal. Sept. 6, 2013) (holding, and summarizing unreported cases finding, that an applicant cannot challenge the validity of a vocational expert's unsupported testimony on number of available jobs, even with contradicting evidence, because a vocational expert's "recognized expertise provides the necessary foundation for his or her testimony" (quoting *Bayliss*, 427 F.3d at 1217-18). To the extent *Bayliss* holds that a vocational expert's testimony is *per se* reliable, no matter what evidence an applicant provides in response, the Ninth Circuit has taken an even more permissive approach as to what constitutes substantial evidence of other work available to an applicant pursuant to 20 C.F.R. § 404.1520(a)(4)(v). This only further demonstrates the necessity of this Court's review.

unsupported testimony once Mr. Biestek requested the data underlying that testimony. Because Mr. Biestek's case arose in the Sixth Circuit, the ALJ made exactly that finding. There is a clear and entrenched conflict of authority on this issue that has existed for over fifteen years and further percolation is unnecessary.

II. THIS CASE PRESENTS A RECURRING, IMPORTANT ISSUE THAT WARRANTS THIS COURT'S REVIEW.

More than two million individuals apply for supplemental security income on the basis of disability annually. SSA Data at tbl. 60. Each of these applications must go through the same five-step analysis for eligibility and as noted above, failure on any step except the third renders the applicant ineligible for benefits.

If an applicant reaches the fifth step, disability benefits are denied if the Commissioner of Social Security can show that other work would be available to the applicant notwithstanding the applicant's disability, and thus the benefits eligibility rises or falls based on this inquiry. Although exact numbers are unavailable, in at least hundreds of thousands of these proceedings annually, vocational experts provide testimony on the availability of other jobs. And, in the three circuits identified above, testimony bereft of any underlying data, even when challenged by an applicant, can be sufficient to satisfy the government's burden and result in a denial of benefits.

Resolution of this conflict is important because there is no logical justification—and significant unfairness—in the current heterogeneity among the circuits on the standard for accepting the testimony of vocational

experts. Moreover, as discussed below, the majority rule is wrong and can, as in Mr. Biestek's case, result in the denial of vitally needed benefits in many situations where an expert's testimony regarding other jobs available to an applicant is completely untested, and thus potentially entirely inaccurate.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THIS CONFLICT.

This case presents a strong vehicle for this Court to review the circuit split. The facts are undisputed, and the Sixth Circuit squarely ruled on the question presented. That ruling was determinative of Mr. Biestek's case and in its ruling the Sixth Circuit explicitly considered and rejected the contrary rule of the Seventh Circuit that Mr. Biestek had proposed.

Moreover, this case is a particularly strong vehicle because the facts precisely frame the question presented and highlight the circuit split. Before the ALJ, Mr. Biestek specifically requested the personal labor market surveys underlying the vocational expert's opinion, and the expert acknowledged the existence of that data but refused to provide it. Pet. App. 118a-119a. The Sixth Circuit held that the ALJ's reliance on only that testimony provided substantial evidence for the ALJ's finding. Pet. App. 22a. Similarly, in *McKinnie*, the applicant requested, and the vocational expert failed to produce, the labor market surveys upon which she relied. Pet. App. 120a-121a. In contrast to the Sixth Circuit, the Seventh Circuit held that the ALJ's reliance on only that testimony failed to provide substantial evidence for his finding. *McKinnie*, 368 F.3d at 911. Because many social security proceedings—including

before ALJs—include uncounseled applicants, the record below is rarely as clean as it is in this case, and requests for the data underlying a vocational expert's conclusions are not usually made with the precision with which they were made here.

Thus, this record, and the courts' decisions based upon it, present the ideal vehicle for review of this question.

IV. THE SIXTH CIRCUIT'S DECISION WAS INCORRECT.

Finally, the Sixth Circuit's decision merits review because it is wrong. As the Seventh Circuit recognized, the fact that the Federal Rules of Evidence are inapplicable in social security benefits proceedings is irrelevant because, regardless of the rules of evidence that apply, an ALJ's decision must be supported by "substantial evidence" to withstand judicial review. 42 U.S.C. § 405(g). *See Donahue*, 279 F.3d at 446 ("[T]he idea that experts should use reliable methods does not depend upon Rule 702 alone, and it plays a role in the administrative process because every decision must be supported by substantial evidence."). The substantial evidence standard requires "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). And, as the Seventh Circuit stressed, "because an ALJ's findings must be supported by substantial evidence, an ALJ may depend upon expert testimony only if the testimony is reliable." *McKinnie*, 368 F.3d at 910. Evidence regarding the number of jobs available to

an applicant cannot be reliable, and therefore cannot be substantial, if it "has been conjured out of whole cloth," *Donahue*, 279 F.3d at 446, or if it is not correctly derived from statistical data.

Yet, under the rule in the Sixth, Second, and Ninth Circuits a vocational expert can opine—without providing *any* supporting data—on the number of jobs available to a disability applicant. And that unsupported testimony alone can constitute "substantial evidence" to satisfy the government's burden to prove that other jobs are available to the applicant and thus that social security benefits on the basis of a disability need not be granted.

There is virtually no other area of the law where an expert's conclusions regarding data constitute "substantial evidence" of a fact when an opposing party challenges the accuracy of those conclusions but the expert refuses to supply—or cannot supply—any underlying data. Further, an individual's opinion based on her expertise alone, absent any empirical data whatsoever, does not constitute "substantial evidence" of a fact in other administrative contexts. *See, e.g.*, *CIBA Corp. v. Weinberger*, 412 U.S. 640, 642 (1973) (requiring "adequate and well-controlled investigations" before the FDA can, based on substantial evidence, determine a drug's safety (quotation marks omitted)); *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453, 464 (1972) (holding that "well-reasoned expert testimony—based on what is known and uncontradicted [sic] by empirical evidence" may be substantial evidence). Yet, the majority rule places social security benefits proceedings separate and apart in this respect.

Moreover, this rule is not only unfair; it is also irrational. As the Seventh Circuit observed, "[p]resumably a vocational expert establishes the foundation for her opinions," and the underlying data constitutes "the preparatory research that she should have completed prior to testifying." *McKinnie*, 368 F.3d at 911. In cases where that data actually exists—as the expert in Mr. Biestek's case claimed it did—there is simply no justification (nor do the courts adopting the majority rule provide one) for denying the applicant access to that data at least in a redacted form or in an *in camera* review, if confidentiality concerns exist. If in fact no such data exists to justify the expert's conclusions, then it is hard indeed to see how the expert's unmoored conclusions on jobs that are available to an applicant could constitute "substantial evidence" necessary to satisfy the government's burden on that point. Adopting the Seventh Circuit's rule that an expert must provide the data underlying her conclusions—even in redacted form—would impose a minimal burden on the expert or the ALJ, but would allow applicants to probe and challenge the expert's conclusions.

Contrary to the Sixth Circuit's characterization, the Seventh Circuit's *Donahue* rule does not require a *Daubert*-like hearing for every vocational expert's testimony. It merely asks that, if challenged, the vocational expert make available the data underlying the expert's opinion. *See, e.g., Britton v. Astrue*, 521 F.3d 799, 802-04 (7th Cir. 2008) (finding that substantial evidence supported ALJ's decision, where vocational expert offered upon request to provide the pages of data she relied upon and counsel instead insisted on the

whole, voluminous publication). This interpretation of 42 U.S.C. § 405(g)'s substantial evidence standard gives ALJs the flexibility Congress intended when exempting social security adjudications from the Federal Rules of Evidence, while ensuring that ALJs' decisions—and the expert conclusions upon which they rely—are supported by substantial evidence. The Sixth Circuit's decision to the contrary was wrongly decided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 21, 2018

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michael J. Biestek,

Plaintiff-Appellant,

v. No. 17-1459

Commissioner of Social Security,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Michigan at Flint.
No. 4:16-cv-10422 – Linda V. Parker, District Judge.

Argued: October 6, 2017

Decided and Filed: December 27, 2017*

Before: CLAY, COOK, and WHITE, Circuit Judges.

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* This decision was originally filed as an unpublished opinion on December 27, 2017. The court has now designated the opinion for publication.

COUNSEL

ARGUED: Meredith E. Marcus, DALEY DISABILITY LAW, P.C., Chicago, Illinois, for Appellant. Michael L. Henry, SOCIAL SECURITY ADMINISTRATION, Boston, Massachusetts, for Appellee. **ON BRIEF:** Meredith E. Marcus, Frederick J. Daley, Jr., DALEY DISABILITY LAW, P.C., Chicago, Illinois, for Appellant. Michael L. Henry, SOCIAL SECURITY ADMINISTRATION, Boston, Massachusetts, for Appellee.

OPINION

COOK, Circuit Judge. Plaintiff-Appellant Michael J. Biestek ("Biestek") alleges that he became disabled on October 28, 2009, for purposes of receiving Disability Insurance Benefits and Supplemental Security Income under the Social Security Act. An Administrative Law Judge ("ALJ") issued a partially favorable decision finding Biestek disabled beginning May [redacted] 2013, some three-and-a-half years short of the time he claimed.

Biestek sought judicial review of the ALJ's finding of non-disability for the period between October 28, 2009, and May [redacted] 2013. The district court rejected his claims. We AFFIRM.

I. BACKGROUND

Biestek, fifty-four, worked for most of his life as a carpenter and a laborer in various construction-related roles. His work frequently entailed transporting scaffolding, panels, and other construction materials around work sites. He completed at least twelve years of education, plus one year of college, and received additional vocational training as a bricklayer and carpenter. He stopped working in June 2005, allegedly due to degenerative disc disease, Hepatitis C, and depression.

Biestek applied for Supplemental Security Income and Disability Insurance Benefits in March 2010, alleging a disability onset date of October 28, 2009. The Social Security Administration ("SSA") initially denied this application in August 2010. Biestek requested a hearing before an ALJ, the ALJ denied Biestek's application, and the Social Security Administration Appeals Council denied review. Biestek timely appealed to the district court. That court adopted a magistrate judge's report and recommendation and remanded the case to the SSA because the ALJ had not obtained necessary medical-expert testimony and did not pose a sufficiently specific hypothetical to the vocational expert.

Following a second hearing and additional opinion gathering, the ALJ issued a partially favorable decision finding Biestek disabled starting on his fiftieth birthday (May [redacted] 2013)—the point at which the Agency deems an applicant "closely approaching advanced age" and thus presumptively disabled pursuant to 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.14; *see also* 20 C.F.R.

§ 404.1563(d) (defining persons "closely approaching advanced age" as between ages fifty and fifty-four). The ALJ found that Biestek was "not disabled" before May [redacted] 2013, however.

Biestek again appealed to the district court. This time, though, the magistrate judge's report and recommendation found that the ALJ's decision should be affirmed in full. Rejecting Biestek's objections, the district court then adopted the report and recommendation. This timely appeal followed.

II. ANALYSIS

Biestek briefs five issues, but because he forfeited one by failing to timely raise it before the district court, just four are properly before us.[1] We will affirm the SSA's conclusions unless the ALJ applied incorrect legal standards or her findings were not supported by substantial evidence in the record. *Wright-Hines v. Comm'r of Soc. Sec.*, 597 F.3d 392, 395 (6th Cir. 2010). Substantial evidence supports a decision if "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" backs it up. *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). Thus, a decision supported by substantial

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[1] Biestek also argues that the ALJ erred by not accounting for alleged moderate limitations in his concentration, persistence, or pace. But because Biestek failed to address this issue in his objections to the magistrate judge's report and recommendation, we consider it forfeited on appeal. *Willis v. Sullivan*, 931 F.2d 390, 401 (6th Cir. 1991).

evidence must stand, even if we might decide the question differently based on the same evidence. *Wright-Hines*, 597 F.3d at 395. It is not our role to "try the case de novo, nor resolve conflicts in evidence, nor decide questions of credibility." *Walters v. Comm'r of Soc. Sec.*, 127 F.3d 525, 528 (6th Cir. 1997) (quoting *Garner v. Heckler*, 745 F.2d 383, 387 (6th Cir. 1984)).

A. Substantial Evidence Supports the ALJ's Finding that Biestek's Medical Condition Did Not "Medically Equal" the Listing

Biestek contends the ALJ incorrectly found that he did not meet or medically equal the back-pain-related impairment listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1, Pt. A1, § 1.04(A).[2] The impairment must last for at least twelve months to meet the terms of the listing. *Id.* at § 1.00(B)(2)(a). The ALJ determined Biestek did not meet or medically equal the listed impairment because Biestek "lack[ed] the requisite motor and sensory deficits, and there [was] no evidence of spinal arachnoiditis or spinal stenosis resulting in pseudoclaudication." The ALJ relied significantly on agency-appointed expert Dr. Frank L. Barnes's opinion

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[2] This listing, for "disorders of the spine," requires (in relevant part) "[e]vidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine)." 20 C.F.R. Pt. 404, Subpt. P, App. 1, Pt. A1, § 1.04(A).

that Biestek's physical condition neither met nor equaled a medical listing while assigning minimal weight to the opinions of Biestek's retained expert, Dr. Alexander J. Ghanayem.

Biestek claims that he "medically equaled" the listing because he displayed all the required criteria at one point or another during the relevant period, even if not concurrently or consistently over twelve months. He also argues that Dr. Ghanayem offered analysis and explanations superior to the allegedly flawed testimony of Dr. Barnes, so that reliance on Barnes's testimony cannot constitute "substantial evidence" in support of the ALJ's opinion.

1. The ALJ Reasonably Found Biestek Did Not "Medically Equal" the Listing

Biestek argues that "medically equaling" the listing does not require all symptoms to be present consistently for a twelve-month period, and that to impose such a requirement would erase the distinction between "meeting" and "medically equaling" a listing. He maintains that displaying different deficits at different times over the course of twelve months is enough to satisfy the duration requirement.

As the Commissioner points out, however, medical equivalency is not a refuge for claimants who show only intermittent signs of impairment. The Commissioner's own regulation makes clear that equivalency exists where a claimant's impairment "is at least equal in severity *and duration* to the criteria of any listed impairment." 20 C.F.R. § 404.1526(a) (emphasis added); *see also Kidd v. Colvin*, No. CV 115-207, 2017

WL 914061, at *4 (S.D. Ga. Feb. 2, 2017) (magistrate's report and recommendation) (finding a failure to meet the duration requirement where the claimant's back pain was only demonstrated by "a handful of abnormal findings scattered throughout the record"), *adopted in full sub nom. Kidd v. Berryhill*, No. CV 115-207, 2017 WL 901896, at *1 (S.D. Ga. Mar. 7, 2017). Medical equivalency does not relieve claimants of the need to demonstrate the long-term nature of an impairment. The Commissioner's regulation allows for variation in the number, type, or severity of the claimant's conditions, so long as the claimant's overall impairment is "at least of equal medical significance" to a listed impairment. 20 C.F.R. § 404.1526(b)(ii). The regulations make no provision, however, for claimants whose condition is reasonably found to be sporadic or intermittent.

2. The ALJ Reasonably Relied on Dr. Barnes's Testimony

Dr. Barnes noted the absence of positive straight leg-raising[3] on most examinations, and that numbness, reflex change, and atrophy were not consistently present over a twelve-month period. In Barnes's opinion, Biestek did not meet or equal any listing.

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[3] A straight-leg raising test (also called a Lasegue test) evaluates a patient's lower back pain. The patient lies on his back and his care provider raises his leg upward, keeping the knee straight. If the patient experiences pain, the test is positive (an abnormal result). *See* 2 Dan J. Tennenhouse, Attorneys Medical Deskbook § 18:4 (4th ed. 2017).

Furthermore, the ALJ noted that MRI images in the record show "only mild-to-moderate degenerative changes with no more than mild stenosis."

Biestek's expert, Dr. Ghanayem, assessed the evidence differently, concluding that Biestek more than met or medically equaled the terms of the listing. The ALJ gave "little weight" to Dr. Ghanayem's opinion, however, due to inconsistencies between Dr. Ghanayem's assessments and other objective medical evidence in the record. Dr. Ghanayem's opinion of Biestek's condition is in tension with the findings of multiple radiologists interpreting multiple MRIs over several years.

Additionally, we note other evidence showing Biestek had, at best, inconsistent back issues during the period he was under the care of treating physician Dr. Howard Wright. Some appointment notes do not reference back pain, only reporting Biestek as having "normal gait and station," while others only a short time later mention some pain.

Dr. Ghanayem also attempted to explain the inconsistent straight-leg raising test results. According to Dr. Ghanayem, if the underlying nerve condition becomes chronic and persists for a significant period, the affected nerves can become so damaged and desensitized that a person can pass the test. Dr. Barnes presented an alternative explanation: in some cases, a patient's spinal injuries heal by themselves, resulting in increased mobility sufficient to pass the straight- leg raising test.

Biestek argues that the ALJ inappropriately credited Dr. Barnes's testimony over Dr. Ghanayem's

opinions. But just because Dr. Ghanayem offered explanations that could reconcile elements of the objective medical record with Biestek's claims does not mean that the ALJ was required to accept those explanations. The ALJ faced dueling opinions from two highly qualified medical experts and found Dr. Barnes's testimony more credible after assessing how well his testimony fit with the objective medical record—a determination she was fully empowered to make. *See Crum v. Sullivan*, 921 F.2d 642, 644 (2d Cir. 1990) ("The [Commissioner], and not the court, is charged with the duty to weigh the evidence, to resolve material conflicts in the testimony, and to determine the case accordingly."). The ALJ based her decision on substantial evidence.

B. The ALJ Acceptably Evaluated Medical Opinion Evidence

Next, Biestek contends that the ALJ failed to properly weigh opinion evidence from two medical experts, Drs. Wright and Barnes.

1. Dr. Wright's Opinions

Dr. Wright saw Biestek frequently between October 2012 and April 2013, and filled out a residual functional capacity ("RFC") questionnaire detailing Biestek's condition in July 2015. Biestek argues that the ALJ erred in not according controlling weight to any of Dr. Wright's assessments.

An ALJ is required to give controlling weight to a treating physician's opinion, so long as that opinion is supported by clinical and laboratory diagnostic evidence not inconsistent with other substantial evidence in the

record. 20 C.F.R. § 404.1527(c)(2); *see also Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 544 (6th Cir. 2004). But if the ALJ concludes that a treating source's medical opinion is not entitled to controlling weight, she must weigh the opinion in light of several factors. *See* 20 C.F.R. § 404.1527(c) (listing factors). The ALJ need not perform an exhaustive, step-by-step analysis of each factor; she need only provide "good reasons" for both her decision not to afford the physician's opinion controlling weight and for her ultimate weighing of the opinion. *Francis v. Comm'r of Soc. Sec.*, 414 F. App'x 802, 804–05 (6th Cir. 2011); *Blakley v. Comm'r of Soc. Sec.*, 581 F.3d 399, 406–07 (6th Cir. 2009); 20 C.F.R. § 404.1527(c)(2).

Dr. Wright provided three opinions on Biestek's condition. Two are reports to the Michigan Department of Human Services from April and October 2013. The third is a residual functional capacity questionnaire created for Biestek's present disability application, from July 2015.

The ALJ declined to give any of Dr. Wright's opinions controlling weight and instead assigned them minimal weight. The ALJ discounted the July 2015 opinion entirely, noting that by then Dr. Wright had not seen Biestek for over two years. Additionally, the ALJ stated that Dr. Wright's earlier opinions were not supported by the objective medical record evidence. She pointed to the "numerous MRI studies [which] showed no more than mild-to-moderate degenerative findings" as the "most notabl[e]" example, but did not specifically refer to any additional evidence in the record to support her reasoning.

Biestek claims the ALJ gave Dr. Wright's opinions short shrift. At a minimum, he asserts the ALJ should have afforded Dr. Wright's 2013 opinions the substantial weight generally accorded a treating physician's opinions. The magistrate judge's report and recommendation agrees that Dr. Wright was one of Biestek's treating physicians during this period. Biestek states that MRI evidence was "the only reason offered by the ALJ to reject Dr. Wright's assessment," and that the ALJ ignored substantial evidence in the record demonstrating Biestek's efforts to alleviate significant pain. Additionally, Biestek argues that the ALJ's reliance on the MRI findings is misplaced in light of Dr. Ghanayem's alternative explanation of the MRI imaging as consistent with Biestek's alleged impairments.

The ALJ had adequate reason to assign minimal weight to Dr. Wright's July 2015 questionnaire. By that time, Dr. Wright had not provided Biestek with medical care for over two years, clearly indicating that Dr. Wright and Biestek were no longer in a treatment relationship. *See* 20 C.F.R. § 404.1527(c)(2)(i)–(ii).

As for Dr. Wright's earlier opinions, while they may be somewhat in accord with other evidence, they are nonetheless inconsistent with prior MRI results showing only mild-to- moderate degeneration. Biestek alleges that the ALJ's failure to elaborate on her specific rationale for discounting Dr. Wright's 2013 opinions beyond referencing the MRI evidence amounts to a failure to provide "good reasons," warranting reversal. But the MRIs were only the "most notabl[e]" evidence the ALJ relied on; other evidence in the record also supports the ALJ's decision. We may consider this

evidence, even if the ALJ failed to mention it. *Heston v. Comm'r of Soc. Sec.*, 245 F.3d 528, 535 (6th Cir. 2001) ("Judicial review of the Secretary's findings must be based on the record as a whole. Both the court of appeals and the district court may look to any evidence in the record, regardless of whether it has been cited [in prior SSA proceedings].").[4]

Here, the ALJ provided a rationale and referred to particular evidence in the record. The point of the "good reasons" rule is to permit meaningful review of the ALJ's decision and to ensure that a claimant is not "bewildered" when an administrative bureaucracy tells him that he is not disabled. Wilson, 378 F.3d at 544 (quoting *Snell v. Apfel*, 177 F.3d 128, 134 (2d Cir. 1999)). There are no such problems in this case. In addition to the MRIs, other record evidence supports the ALJ's conclusion, even if she referenced such evidence in a more general way.

As the Commissioner points out, the examination notes from Biestek's various visits to Dr. Wright during the six-month period when Dr. Wright was Biestek's

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[4] Other Sixth Circuit cases finding that an ALJ failed to provide "good reasons" where the ALJ did not cite material in the record that could have supported the ALJ's decision are distinguishable. In *Wilson*, the ALJ offered only a summary rejection of the opinion of the claimant's treating physician, with no analysis or support whatsoever. 378 F.3d at 545–46. And in *Rogers v. Commissioner of Social Security*, the ALJ dismissed the reports of multiple treating physicians based on evidence that could not reasonably outweigh the evidence proffered by the treating physicians. 486 F.3d 234, 243–44 (6th Cir. 2007).

treating physician provide some of the most notable evidence apart from the MRIs. There is little consistency regarding the back pain alleged. The first report describes Biestek as possessing "normal gait and station," and makes no mention of any back pain issues. The next two exams identified back pain as an issue, but no back pain is reported in the following three exams. Back pain then re-emerges on the final set of examination notes. These exam notes are difficult to reconcile with the stark portrait of Biestek's condition that Dr. Wright painted in the two 2013 medical examination reports.

Substantial evidence supported the ALJ's decision, and the ALJ provided a sufficient rationale. "No purpose would be served by remanding for the ALJ to explicitly address the shortcomings of [Dr. Wright's] opinion and the evidence and methods underlying it." *Kornecky v. Comm'r of Soc. Sec.*, 167 F. App'x 496, 507 (6th Cir. 2006).

2. Dr. Barnes's Opinion

a. Restriction on Bending at the Waist and Lifting Weight

Dr. Barnes testified that Biestek could occasionally squat and pick up objects weighing up to ten pounds, but that he would not be able to bend at the waist to do so. The ALJ gave this portion of Dr. Barnes's testimony "great weight," but did not incorporate a specific restriction on bending at the waist to lift up to ten pounds into her RFC analysis or into a hypothetical posed to the vocational expert. Biestek contends that, as a result, the hypothetical "did not fairly portray

Biestek's limitations as supported by the objective evidence and the ultimate findings by the ALJ," an error that "cannot be deemed harmless" because the ALJ specifically granted this portion of Barnes's testimony great weight.

The ALJ actually did incorporate a restriction on "occasional stooping," however. The Agency defines "stooping" as "bending the body downward and forward by bending the spine at the waist." SSR 83-14, 1983 WL 31254, at *2 (Jan. 1, 1983). Biestek replies that the ALJ's reference to "occasional stooping" conflicts with Dr. Barnes's total prohibition on bending at the waist. But Biestek is mistaken: Dr. Barnes did not impose a restriction on all bending at the waist. He only opined that Biestek could not bend at the waist and lift weight. The ALJ not only incorporated a limit on weight lifting into her hypothetical, she was even more restrictive than Dr. Barnes. The ALJ asked the vocational expert if jobs would be available for someone who "could not lift more than five pounds at a time." Overall, the ALJ adequately addressed the ultimate issue—Biestek's ability to lift up to ten pounds of weight.

Biestek also claims that because the SSA has itself held that some stooping is required to do most work, the ALJ should have sought further clarification on the impact of stooping. The vocational expert proposed two jobs—bench (final) assembler and nut sorter—from the *Dictionary of Occupational Titles* ("DOT") that the ALJ incorporated into her RFC analysis. But neither of these jobs requires any stooping at all. DOT § 713.687-018, 1991 WL 679271 ("Stooping:

Not Present – Activity or condition does not exist."); *see also* DOT § 521.687-086, 1991 WL 674226 (same).

b. Exertion of Force

Biestek also complains that according to the DOT, the bench assembler and nut sorter jobs may have required Biestek to "exert[] up to 10 pounds of force occasionally[5] . . . and/or a negligible amount of force frequently[6] to lift, carry, push, pull, or otherwise move objects," in violation of Dr. Barnes's prohibition on lifting ten pounds from the waist. DOT § 713.687-018, 1991 WL 679271 (final assembler); DOT § 521.687-086, 1991 WL 674226 (nut sorter). Yet nothing in the DOT indicates that such exertion requires lifting objects from ground level. As the Commissioner points out, Biestek could have exerted the necessary force in other ways, such as while seated or while working with objects at table height.

C. The ALJ Acceptably Assessed Biestek's Credibility

The ALJ described the various treatments Biestek has received over the years as "relatively effective in controlling his symptoms." The efficacy of these treatments diminished Biestek's credibility. The

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[5] The DOT defines "occasionally" as an "activity or condition exist[ing] up to 1/3 of the time." DOT § 713.687-018, 1991 WL 679271; *see also* DOT § 521.687-086, 1991 WL 674226 (same).

[6] "Frequently" is defined as an "activity or condition exist[ing] from 1/3 to 2/3 of the time." DOT § 713.687-018, 1991 WL 679271; *see also* DOT § 521.687-086, 1991 WL 674226 (same).

ALJ also noted that, throughout the record, Biestek reported engaging in a variety of daily activities suggestive of physical capacity to perform at least some sedentary work. Further, the ALJ discussed Biestek's history of non-compliance with his treatment regimen, citing numerous examples of Biestek cancelling or no-showing his medical appointments and his failure to take many of his medications as prescribed. These findings factored into the ALJ's RFC assessment.

Biestek takes issue with each of these alleged faults in his credibility, and additionally charges that the opinions of Drs. Barnes and Ghanayem should have enhanced his credibility. His task is especially difficult: while an ALJ's credibility determinations must be supported by substantial evidence, we accord them special deference. *Walters v. Comm'r of Soc. Sec.*, 127 F.3d 525, 531 (6th Cir. 1997). Given this standard, we cannot say the ALJ erred.

1. Symptom Control

The ALJ cited Biestek's favorable reaction to Demerol, as well as nerve blocks, physical therapy, and back injections as examples of treatments that provided Biestek relief. Biestek alleges that the ALJ wrongly characterized these treatments as permanently "controlling" his pain rather than granting temporary respite. There is certainly record evidence showing that these measures did not completely negate Biestek's pain, and that in some cases treatment benefits did not persist for an extended period. But the ALJ never characterized Biestek's pain as permanently and comprehensively mitigated, instead describing the various treatments Biestek received as "relative[ly]

effective[]." Moreover, she acknowledged the pain Biestek continued to endure by restricting his RFC to a narrow range of sedentary work with a variety of accommodations.

2. Daily Activities Considered

The ALJ noted that, at various times, Biestek said he engaged in a range of activities indicative of his RFC. For example, Biestek reported reading the newspaper, preparing simple meals, visiting his son at least twice a week, driving, doing laundry, shopping, cashing checks, providing childcare, watching television, running errands, playing video games, and making appointments.

Biestek objects to the ALJ's characterization of these activities, noting that he could do several of them from any position, including reading the newspaper, making appointments, and watching TV. He disputes the ALJ's assertion that he participated in childcare as Biestek's son was seventeen years old at the time of the 2015 hearing, making it unclear what "childcare" he could be engaged in. He also attempts to add color to several of the other tasks. He describes driving a car as a rare event, perhaps only occurring once a month. He says he confines his meal preparation to the microwave, does the laundry just once every two to three weeks, and only goes to the grocery store approximately once a month (and that even at the store, he has had to lie down in the aisle to relieve bouts of pain).

While Biestek's ability to perform many of these activities is definitely limited, the ALJ also cited other activities much more obviously at odds with his claims of

debilitating pain. For example, once Biestek started taking Vicodin, his quality of life improved such that he was able to exercise and play football with his son. Overall, the ALJ based her conclusions on a reasonable interpretation of the record.

3. Non-Compliance with Treatment Regimen

The ALJ also noted that Biestek has been non-compliant with his prescribed treatments, undercutting his testimony concerning the severity of his condition. In particular, the ALJ pointed to Biestek's repeated no-shows and cancellations for his medical appointments. Additionally, the ALJ referred to Biestek's admitted habit of selectively taking his prescribed medication. He took his pain medication "once in a while as needed." Other medications reveal even more problematic usage patterns. His care provider noted that Biestek stopped taking Wellbutrin (an antidepressant) both because it made him feel "weird," and because "he does not believe much in medication so that is why he does not take it." The care provider also noted that Biestek "reports he does not tell Gianina Cristiu, NP about not taking medication because he does not want to hurt his chances of obtaining SSI." While adverse side effects are a reasonable excuse for an applicant to interrupt a prescribed treatment regimen, *see* SSR 16-3P, 2016 WL 1119029, at *9 (Mar. 16, 2016), the other rationales Biestek supplied for not taking certain medications display a pattern of behavior the ALJ reasonably interpreted as undermining Biestek's credibility.

4. Testimony of Drs. Barnes and Ghanayem

Biestek further contends that because Drs. Barnes and Ghanayem concurred that Biestek's subjective statements were "entirely consistent with his pathology," the ALJ erred in failing to address this favorable credibility evidence. But the ALJ had significant reasons for discounting Dr. Ghanayem's testimony, and Dr. Barnes testified that Biestek could tolerate a range of sedentary work. The ALJ's failure to respond to these opinions does not deprive her decision of the support of substantial evidence.

5. The ALJ's Use of Evidence from After Biestek's Disability Date

Some of the evidence discussed by the ALJ postdates May [redacted] 2013, when the ALJ found Biestek disabled upon his fiftieth birthday. For example, the ALJ referenced a July 23, 2013, report by Edward Czarnecki, Ph.D., indicating that Biestek "could perform simple, rote, repetitive unskilled work." Citing no authority, Biestek claims that it was unfair to point to evidence after Biestek's disability date to impugn his credibility before that time. This is a flawed argument. Nothing about Biestek's substantive medical condition changed on May [redacted] 2013; he simply turned fifty years old, thereby creating an administrative presumption that he was disabled. 20 C.F.R. Part 404, Subpt. P, App. 2, § 201.00(g). Evidence from after his formal disability date is as relevant to discerning Biestek's credibility as evidence predating it.

D. The ALJ Did Not Err in Refusing to Require the Vocational Expert to Provide Specific Data in Support of Her Opinions

Finally, Biestek argues that the ALJ erred by refusing to require the vocational expert to produce data or other documentation to support her opinions regarding the work available to Biestek. Instead, the vocational expert based her testimony on the *Dictionary of Occupational Titles* and her "professional experience," gained from talking with employers and conducting job analyses. When Biestek's counsel requested the vocational expert produce underlying data or analyses in support of her statements, she refused, citing the confidentiality of her files, and the ALJ declined to require her to produce such information, even in a redacted format.

Biestek alleges reversible error because little substantiates the reliability of the vocational expert's testimony other than her word. Biestek argues such testimony falls short of "substantial evidence."

This court has not yet squarely addressed the extent to which vocational experts must produce underlying data in support of their opinions. There is a divide, however, between the Seventh Circuit and several other circuits that have staked a position. The Seventh Circuit adopted a rigorous approach in a pair of cases, *Donahue v. Barnhart*, 279 F.3d 441 (7th Cir. 2002), and *McKinnie v. Barnhart*, 368 F.3d 907 (7th Cir. 2004), incorporating the essence, if not the explicit requirements, of Federal Rule of Evidence 702 into the administrative adjudicative process as applied to vocational expert testimony. *See McKinnie*, 368 F.3d at

910–11. Expressing fear that vocational expert testimony could be "conjured out of whole cloth," *Donahue*, 279 F.3d at 446, the Seventh Circuit obliges vocational experts to provide the data and reasoning used in support of their conclusions upon request, *McKinnie*, 368 F.3d at 910–11. Biestek would like us to establish a similar rule for the Sixth Circuit.

But the Seventh Circuit's rule "has not been a popular export." *Brault v. Comm'r of Soc. Sec.*, 683 F.3d 443, 449 (2d Cir. 2012). Congress specifically exempted Social Security disability proceedings from the strictures of the Federal Rules of Evidence, allowing ALJs to consider a broader range of potentially relevant information than would be admissible in an ordinary court of law. 42 U.S.C. § 405(b)(1) ("Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure."). Yet despite Congress's explicit command, *Donahue* and *McKinnie* effectively import a key provision of the Federal Rules of Evidence into Social Security proceedings. As the Second Circuit noted, "[i]t is unclear . . . why the Seventh Circuit would acknowledge in Donahue that ALJs are not bound by the Rules of Evidence, but then turn around and require ALJs to hew so closely to [them]." *Brault*, 683 F.3d at 449. Other courts of appeals have followed the Second Circuit's lead. *See Welsh v. Comm'r of Soc. Sec.*, 662 F. App'x 105, 109–10 (3d Cir. 2016) (rejecting the Seventh Circuit approach due to conflict with 42 U.S.C. § 405(b)(1)); *see also Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) ("An ALJ may take administrative notice of any reliable job information,

including information provided by a [vocational expert]. A [vocational expert]'s recognized expertise provides the necessary foundation for his or her testimony. Thus, no additional foundation is required." (internal citation omitted)).

Furthermore, there is little clarity on how to apply the *Donahue* and *McKinnie* standards. The Seventh Circuit required the Commissioner to implement an evidentiary rule "similar though not necessarily identical to that of Rule 702," but it is unclear what, precisely, such a rule would look like. *Donahue*, 279 F.3d at 446.

While it is undoubtedly true that vocational expert testimony that is "conjured out of whole cloth" cannot be considered substantial evidence, *see id.*, the Commissioner rightly points out that "guarding against baseless testimony is very different" from incorporating the stringent evidentiary requirements embodied in the Federal Rules of Evidence. Moreover, Biestek aired his concerns to the ALJ, who accepted the vocational expert's testimony over his objections. There is "no reason to suppose that the ALJ did not carefully weigh the credibility of witnesses who testified, and the ALJ's acceptance of [the vocational expert's] testimony cannot be said to have been improper." *Sias v. Sec'y of Health & Human Servs.*, 861 F.2d 475, 481 (6th Cir. 1988). Ultimately, responsibility for weighing the credibility of witnesses belongs to the ALJ, who in this case acceptably fulfilled that obligation.

III. CONCLUSION

For these reasons, we AFFIRM the district court's decision.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-1459

FILED
December 27, 2017
DEBORAH S. HUNT, Clerk

MICHAEL J. BIESTEK,
Plaintiff - Appellant,

v.

COMMISSIONER OF SOCIAL SECURITY,
Defendant - Appellee.

Before: CLAY, COOK, and WHITE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Flint.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

**ENTERED BY ORDER OF
THE COURT**

/s/
Deborah S. Hunt, Clerk

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL J. BIESTEK,

Plaintiff,

v.

Civil Case No. 16-1010422
Honorable Linda V. Parker

NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY

Defendant.

OPINION AND ORDER (1) ADOPTING MAGISTRATE JUDGE'S FEBRUARY 24, 2017 REPORT AND RECOMMENDATION [ECF NO. 28]; (2) DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [ECF NO. 22]; (3) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [ECF NO. 23]; (4) GRANTING DEFENDANT'S EX PARTE MOTION FOR LEAVE TO FILE EXCESS PAGES [ECF NO. 30] AND (5) GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE REPLY TO RESPONSE TO OBJECTIONS [ECF NO. 32]

On February 5, 2016, Plaintiff filed this lawsuit challenging Defendant's final decision denying his application for benefits under the Social Security Act. (ECF No. 1.) On February 12, 2016, the matter was referred to Magistrate Judge Mona K. Majzoub for all pretrial proceedings, including a hearing and determination of all non-dispositive matters pursuant to 28 U.S.C. § 636(b)(1)(A) and/or a report and recommendation ("R&R") on all dispositive matters pursuant to 28 U.S.C. § 636(b)(1)(B).[1] (ECF No. 13.) The parties subsequently filed cross- motions for summary judgment. (ECF Nos. 22, 23.)

I. Background

On February 24, 2017, Magistrate Judge Majzoub issued her R&R in which she recommends that this Court deny Plaintiff's motion, grant Defendant's motion, and affirm Defendant's decision finding Plaintiff not disabled under the Social Security Act. (ECF No. 28.) In her thorough analysis, Magistrate Judge Majzoub first rejects Plaintiff's argument that the administrative law judge ("ALJ") erred in determining that Plaintiff's impairments do not meet or medically equal Listing 1.04. (*Id.* at Pg ID 2195.) Magistrate Judge Majzoub next declines Plaintiff's argument that the ALJ improperly evaluated the medical opinion evidence. (*Id.* at Pg ID 2199.) Magistrate Judge Majzoub dismisses Plaintiff's third argument that the ALJ failed to adequately account for Plaintiff's limitations in concentration, persistence, or pace. (*Id.* at Pg ID 2208.) The magistrate

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[1] This matter was first referred to Magistrate Judge R. Steven Whalen on February 8, 2016. (ECF No. 5.)

judge also deferred to the ALJ's determinations that Plaintiff's statements were not entirely credible and that the statements made by Plaintiff's mother should be given little weight. (*Id.* at Pg ID 2215). Lastly, Magistrate Judge Majzoub rejected Plaintiff's contention that the ALJ's step-five determination is not supported by substantial evidence. (*Id.*)

Magistrate Judge Majzoub concludes by advising the parties that they may object to and seek review of the R&R within fourteen days of service upon them. (*Id* at 2218.) She further specifically advises the parties that "[f]ailure to file specific objections constitutes a waiver of any further right to appeal." (*Id.*) Plaintiff filed objections on March 10, 2017. (ECF No. 29.) Defendant responded to Plaintiff's objections on March 21, 2017.[2] (ECF No. 31.)

II. Standard of Review

When objections are filed to a magistrate judge's R&R on a dispositive matter, the Court "make[s] a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The Court, however, "is not required to articulate all of the reasons it rejects a party's objections." *Thomas v. Halter*, 131 F. Supp. 2d 942, 944 (E.D. Mich. 2001) (citations omitted). A party's failure to file objections to

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[2] Defendant filed an ex parte motion requesting leave to file excess pages in their response to Plaintiff's objections. (ECF No. 30.) The Court grants Defendant's motion.

certain conclusions of the report and recommendation waives any further right to appeal on those issues. *See Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Likewise, the failure to object to certain conclusions in the magistrate judge's report releases the Court from its duty to independently review those issues. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985).

III. Applicable Law & Analysis

A. Objection 1

In Plaintiff's first objection, he reiterates the argument asserted in his summary judgment motion that the ALJ's step-five determination is not supported by substantial evidence. (ECF No. 22 at Pg ID 2129.) In particular, Plaintiff argues that the testimony of the vocational expert ("VE") was not supported by substantial evidence because the VE based her testimony on her experience. (*Id.* at Pg ID 2130.) As Magistrate Judge Majzoub notes, the VE based her testimony "on her eleven-year experience as a vocational rehabilitation consultant, which included talking with employers, performing on-the-job analysis, and conducting her own individual labor market surveys." (ECF No. 28 at Pg ID 2215.) At the end of VE's testimony, counsel for Plaintiff requested evidence of VE's experience. (*Id.*) The VE testified that it would require revealing patient's private confidential files; therefore, the ALJ determined that she would not require the VE to produce those files. (*Id.*)

Plaintiff contends that the VE was required to provide support for her testimony, relying on a standard

articulated by the Seventh Circuit in *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002). In *Donahue*, the Seventh Circuit stated that:

> If the basis of the vocational expert's conclusions is questioned at the hearing, however, then the ALJ should make an inquiry (similar though not necessarily identical to that of Rule 702) to find out whether the purported expert's conclusions are reliable. Social Security Ruling 00–4p, promulgated in December 2000 (and thus not directly applicable to this case), is to much the same effect. This ruling requires the ALJ to "[e]xplain [in the] determination or decision how any conflict [with the Dictionary] that has been identified was resolved." (Emphasis added.) The ruling requires an explanation only if the discrepancy was "identified"—that is, if the claimant (or the ALJ on his behalf) noticed the conflict and asked for substantiation.

Donahue, 279 F.3d at 446-47. The Sixth Circuit has not adopted this standard. *See Masters v. Astrue*, No. 07-123, 2008 WL 4082965 (E.D. Ky. Aug. 29, 2008) (rejecting Seventh Circuit standard requiring remand due to failure to inquire into reliability because "reliability is a factor only in the Sixth Circuit"). Plaintiff re- asserts his summary judgment argument that this Court should rely on *Donahue* although it has not been expressly

adopted by the Sixth Circuit. This Court declines to do so.

B. Objection 2

Plaintiff next argues that the magistrate judge erred when she did not apply SSR 16-3p retroactively. (ECF No. 29 at Pg ID 2227.) SSR 16-3p, which went into effect on March 28, 2016, supersedes SSR 96-7p. *See* SSR 16-3p, 2016 WL 1119029 at *1; 2016 WL 1237954 (amending the effective date). SSR 16-3p provides guidance on how the Social Security Administration should "evaluate statements regarding the intensity, persistence, and limiting effects of symptoms in disability claims[.] SSR 16-3p, 2016 WL 1119029 at *1. Because SSR 16-3p went into effect after the ALJ's decision, Magistrate Judge Majzoub complied with its precursor, SSR 96-7p. (ECF No. 28 at Pg ID 2211.) Plaintiff contends that Magistrate Judge Majzoub should have applied SSR 16-3p retroactively. (ECF No. 29 at Pg ID 2227.)

Plaintiff does not provide any binding authority to support its claim that the ruling should be applied retroactively. Further, as Defendant notes, Plaintiff did not raise an argument to apply SSR 16-3p retroactively in his initial brief and has thus waived the argument. *See Emmons v. Comm'r of Soc. Sec.*, No. 12-15235, 2014 WL 1304936 at *1 (E.D. Mich. Feb. 13, 2014) (citing *United States v. Jerkins*, 871 F.2d 598, 601 (6th Cir. 1989)).

C. Objection 3

Next, Plaintiff argues that Magistrate Judge Majzoub erred in evaluating the opinion evidence. (ECF No. 29 at Pg ID 2234.) First, Plaintiff notes that the

magistrate judge found that Dr. Wright's opinion was inconsistent with objective evidence. (*Id.*) Plaintiff mischaracterizes the magistrate judge's opinion. Magistrate Judge Majzoub stated that it would be inconsistent to state that Dr. Wright had an "ongoing treatment relationship" with Plaintiff pursuant to the requirement in 20 C.F.R. 1502. (ECF No. 28 at Pg ID 2202.) Magistrate Judge Majzoub's R&R makes clear that Dr. Wright would not qualify as a treating physician pursuant to the statute because he had not treated Plaintiff for over two years. (*Id.*)

Plaintiff also contends that Magistrate Judge Majzoub is incorrect with her analysis of Dr. Barnes' assessment. Plaintiff states that "Dr. Barnes specifically stated that he did not believe Plaintiff could even occasionally bend at the waist and the ALJ so found." (ECF No. 29 at Pg ID 2237.) However, Plaintiff's citations do not support that assertion. In fact, Plaintiff cites to the following:

> At the second hearing, Dr. Barnes opined the claimant could occasionally lift 10 pounds of weight and frequently lift 5 pounds of weight; sit for 8 hours of the day, a couple hours at a time; stand or walk for 2-4 hours, in increments of about a half hour at a time before having to sit down for about 10 minutes; and could squat to pick up 10 pounds **but not bend at the waist to do so.**"

(ECF No. 17-9 at Pg ID 801-02.) (emphasis added). Plaintiff also cites to the testimony of Dr. Barnes, where the doctor states that Plaintiff "could probably squat

down to pick up ten pounds occasionally, but I don't think he would be able to bend over at the waist (INAUDIBLE) occasionally." (*Id.* at Pg ID 973.) His testimony was in reference to Plaintiff's ability to lift certain weights. An interpretation that Dr. Barnes meant Plaintiff could not bend over at the waist to lift certain weights is consistent with Dr. Barnes' testimony at the second hearing.

D. Objections 4 and 5

Plaintiff's fourth objection states that the magistrate judge erred in determining that Plaintiff's impairments did not meet or medically equal Listing 1.04. (ECF No. 29 at Pg ID 2238.) The fifth objection argues that Plaintiff was denied his right to due process when the ALJ denied his request to allow Dr. Ghanayem appear as a rebuttal witness. (*Id.* at Pg ID 2243.)

To properly object to the R&R, Plaintiff must do more than merely restate the arguments set forth in his summary judgment motion. *See Owens v. Comm'r of Soc. Sec.*, 1:13-47, 2013 WL 1304470, at *3 (W.D. Mich. Mar. 28, 2013) (indicating that the "Court is not obligated to address objections [which are merely recitations of the identical arguments made before the magistrate judge] because the objections fail to identify the specific errors in the magistrate judge's proposed recommendations") (emphasis in original); *see also Camardo v. Gen. Motors Hourly-Rate Emps. Pension Plan*, 806 F. Supp. 380, 382 (W.D.N.Y. 1992) (recitations of nearly identical arguments are insufficient as objections and constitute an improper "second bite at the apple"); *Nickelson v. Warden*, No. 1:11 - cv-334, 2012 WL 700827, at *4 (S.D. Ohio Mar. 1, 2012) ("[O]bjections

to magistrate judges' reports and recommendations are not meant to be simply a vehicle to rehash arguments set forth in the petition."). In both the fourth and fifth objections, Plaintiff re-asserts the arguments stated in his summary judgment motion to support his claims of error in the ALJ's analysis without identifying how Magistrate Judge Majzoub erred in evaluating those arguments. (ECF No. 29 at Pg ID 2238, 2243.) For the reasons Magistrate Judge Majzoub provided in her R&R, Plaintiff's arguments are without merit.

For these reasons, the Court rejects Plaintiff's objections to Magistrate Judge Majzoub's February 24, 2017 R&R and adopts the recommendations in the R&R.

Accordingly,

IT IS ORDERED that Plaintiff's motion for summary judgment (ECF No. 22) is **DENIED**;

IT IS FURTHER ORDERED that Defendant's motion for summary judgment (ECF No. 23) is **GRANTED**;

IT IS FURTHER ORDERED that Defendant's ex parte motion for leave to file excess pages (ECF No. 30) is **GRANTED**;

IT IS FURTHER ORDERED that Plaintiff's motion for leave to file reply to Defendant's response to objections (ECF No. 32) is **GRANTED**;

IT IS FURTHER ORDERED that Defendant's decision denying Plaintiff's application for benefits under the Social Security Act is **AFFIRMED**.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: March 30, 2017

I hereby certify that a copy of the foregoing document was mailed to counsel of record and/or pro se parties on this date, March 30, 2017, by electronic and/or U.S. First Class mail.

s/ Richard Loury
Case Manager

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHEAL J. BIESTEK,

Plaintiff,

CIVIL ACTION NO. 16-CV-10422

v.

DISTRICT JUDGE LINDA V. PARKER

COMMISSIONER OF SOCIAL SECURITY

Defendant.

MAGISTRATE JUDGE MONA K. MAJZOUB

REPORT AND RECOMMENDATION

Plaintiff Michael J. Biestek seeks judicial review of Defendant Commissioner of Social Security's determination that he is not entitled to social security benefits for his physical and mental impairments under 42 U.S.C. § 405(g). (Docket no. 1.) Before the Court are Plaintiff's Motion for Summary Judgment (docket no. 22) and Defendant's Motion for Summary Judgment (docket no. 23). Plaintiff has also filed a reply brief in support of his Motion for Summary Judgment. (Docket no. 25.) The motions have been referred to the undersigned for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). (Docket no. 13.) The Court has reviewed the pleadings, dispenses with a hearing pursuant to Eastern District of Michigan Local Rule 7.1(f)(2), and issues this Report and Recommendation.

I. RECOMMENDATION

For the reasons that follow, it is recommended that Plaintiff's Motion for Summary Judgment (docket no. 22) be **DENIED** and Defendant's Motion for Summary Judgment (docket no. 23) be **GRANTED**.

II. PROCEDURAL HISTORY

The undersigned adopts and incorporates by reference the procedural history of this matter set forth in the ALJ's decision. (TR 721-22.)

III. HEARING TESTIMONY AND MEDICAL EVIDENCE

In his brief, Plaintiff sets forth the procedural history of this matter and a brief statement of the case, informing that his medical records are incorporated by reference in the argument portion of his brief. (Docket no. 22 at 2-3.) The ALJ summarized Plaintiff's hearing testimony, Plaintiff's medical record, and the vocational expert's (VE's) testimony in her decision. (TR 724-38.) Defendant adopts the ALJ's recitation of the facts. (Docket no. 23 at 5.) There are no material inconsistencies between the ALJ's summary of the facts and the record; therefore, the undersigned will incorporate the summary by reference. Additionally, the undersigned has conducted an independent review of Plaintiff's medical record and the hearing transcript and will include comments and citations as necessary throughout this Report and Recommendation.

IV. ADMINISTRATIVE LAW JUDGE'S DETERMINATION

The ALJ found that Plaintiff met the insured status requirements of the Social Security Act through December 31, 2010, and that he had not engaged in substantial gainful activity since the alleged onset date. (TR 724.) The ALJ also found that Plaintiff suffered from the following severe impairments: degenerative disc disease, hepatitis C, asthma, and depression, but his impairments did not meet or medically equal the severity of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (TR 724-27.) The ALJ then found that Plaintiff had the following RFC:

> [C]laimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 404.1567(a) and 416.967(a) except [he] requires work in a relatively clean air work environment, such as no fumes, gases, concentrated dust or other pollutants; no climbing of ladders, ropes, or scaffolds; no climbing of ramps or stairs; no crawling; occasional stooping, crouching or kneeling; occasional flexion, extension, or rotation of the neck; no operation at hazardous heights or around dangerous machinery; no operation in temperature extremes; no work in food service or medical assistance areas; requires a sit/stand option at will, but not to exceed 30 minutes at a time in either position; is limited to simple, routine tasks such as those jobs at the SVP 1 or 2 level

> due to pain, fatigue, and depression causing occasional limitations in ability to maintain concentration for extended periods, but not off task for more than 10% of the workday, as well as occasional limitations in ability to carry out detailed instructions; requires use of a can for prolonged ambulation; and is limited to brief and superficial interaction (i.e. infrequent and not very involved) with the public, coworkers, and supervisors.

(TR 727-36.) Subsequently, the ALJ noted that prior to the established disability onset date, Plaintiff was a younger individual age 45-49, but his age category changed to that of an individual closely approaching advanced age on May [redacted] 2013. (TR 737.) Then, in reliance on the VE's testimony, the ALJ determined that prior to May [redacted] 2013, Plaintiff was capable of performing a significant number of jobs in the national economy, but beginning on May [redacted] 2013, there were no such jobs that Plaintiff could perform. (TR 737-38.) Therefore, the ALJ found that Plaintiff was not disabled under the Social Security Act at any time prior to May [redacted] 2013, but became disabled on that date and continued to be disabled through the date of the decision. (TR 722-23, 738-39.)

V. LAW AND ANALYSIS

A. Standard of Review

Pursuant to 42 U.S.C. § 405(g), this Court has jurisdiction to review the Commissioner's final decisions. Judicial review of the Commissioner's

decisions is limited to determining whether his findings are supported by substantial evidence and whether he employed the proper legal standards. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Walters v. Comm'r*, 127 F.3d 525, 528 (6th Cir. 1997). Substantial evidence is more than a scintilla but less than a preponderance; it is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson*, 402 U.S. at 401 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Walters*, 127 F.3d at 528. It is not the function of this Court to try cases de novo, resolve conflicts in the evidence, or decide questions of credibility. *See Brainard v. Sec'y of Health and Human Servs.*, 889 F.2d 679, 681 (6th Cir. 1989); *Garner v. Heckler*, 745 F.2d 383, 387 (6th Cir. 1984).

In determining the existence of substantial evidence, the court must examine the administrative record as a whole. *See Kirk v. Sec'y of Health and Human Servs.*, 667 F.2d 524, 536 (6th Cir. 1981), *cert. denied*, 461 U.S. 957 (1983). If the Commissioner's decision is supported by substantial evidence, it must be affirmed, even if the reviewing court would decide the matter differently, *Kinsella v. Schweiker*, 708 F.2d 1058, 1059 (6th Cir. 1983), and even if substantial evidence also supports the opposite conclusion. *See Her v. Comm'r*, 203 F.3d 388, 389-90 (6th Cir. 1999); *Mullen v. Bowen*, 800 F.2d 535, 545 (6th Cir. 1986) (en banc) (noting that the substantial evidence standard "presupposes that there is a zone of choice within which the decisionmakers can go either way, without interference by the courts"). "But '[a]n ALJ's failure to follow agency rules and regulations denotes a lack of substantial evidence, even

where the conclusion of the ALJ may be justified based upon the record.'" *Gayheart v. Comm'r of Soc. Sec.*, 710 F.3d 365, 374 (6th Cir. 2013) (quoting *Cole v. Astrue*, 661 F.3d 931, 937 (6th Cir. 2011)).

B. Framework for Social Security Determinations

Plaintiff's Social Security disability determination was made in accordance with a five- step sequential analysis. In the first four steps, Plaintiff was required to show that:

(1) Plaintiff was not presently engaged in substantial gainful employment; and

(2) Plaintiff suffered from a severe impairment; and

(3) the impairment met or was medically equal to a "listed impairment;" or

(4) Plaintiff did not have the residual functional capacity (RFC) to perform relevant past work.

See 20 C.F.R. § 404.1520(a)-(f). If Plaintiff's impairments prevented Plaintiff from doing past work, the Commissioner, at step five, would consider Plaintiff's RFC, age, education, and past work experience to determine if Plaintiff could perform other work. If not, Plaintiff would be deemed disabled. *See id.* at § 404.1520(g). The Commissioner has the burden of proof only on "the fifth step, proving that there is work available in the economy that the claimant can perform." *Her*, 203 F.3d at 391. To meet this burden, the Commissioner must make a finding "supported by

substantial evidence that [the claimant] has the vocational qualifications to perform specific jobs." *Varley v. Sec'y of Health and Human Servs.*, 820 F.2d 777, 779 (6th Cir. 1987). This "substantial evidence" may be in the form of vocational expert testimony in response to a hypothetical question, "but only 'if the question accurately portrays [the claimant's] individual physical and mental impairments.'" *Id.* (citations omitted).

C. Analysis

The Social Security Act authorizes "two types of remand: (1) a post judgment remand in conjunction with a decision affirming, modifying, or reversing a decision of the [Commissioner] (a sentence-four remand); and (2) a pre-judgment remand for consideration of new and material evidence that for good cause was not previously presented to the [Commissioner] (a sentence-six remand)." *Faucher v. Sec'y of Health and Human Servs.*, 17 F.3d 171, 174 (6th Cir. 1994) (citing 42 U.S.C. § 405(g)). Under a sentence-four remand, the Court has the authority to "enter upon the pleadings and transcript of the record, a judgment affirming, denying, or reversing the decision of the [Commissioner], with or without remanding the cause for a hearing. 42 U.S.C. § 405(g). Where there is insufficient support for the ALJ's findings, "the appropriate remedy is reversal and a sentence-four remand for further consideration." *Morgan v. Astrue*, 10-207, 2011 WL 2292305, at *8 (E.D. Ky. June 8, 2011) (citing *Faucher*, 17 F.3d at 174).

Plaintiff asserts that this matter should be reversed for an award of benefits or remanded for further proceedings under sentence four because (1) the ALJ erred in evaluating Listing 1.04; (2) the ALJ erred

in evaluating the medical opinion evidence; (3) the ALJ erred in evaluating Plaintiff's restrictions in concentration, persistence, or pace; (4) the ALJ's credibility assessment is erroneous; and (5) the ALJ's step-five determination is not supported by substantial evidence. (Docket no. 22.)

1. The ALJ's Assessment of Plaintiff's Impairments under Listing 1.04

Plaintiff challenges the ALJ's determination at step three of the sequential evaluation process that Plaintiff's impairments do not meet or medically equal Listing 1.04. (Docket no. 22 at 3-7.) At the third step of the sequential evaluation process, a claimant will be deemed presumptively disabled and eligible for benefits if his impairment meets or medically equals one of the listings in the Listing of Impairments. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). "When considering presumptive disability at Step Three, an ALJ must analyze the claimant's impairments in relation to the Listed Impairments and give a reasoned explanation of his findings and conclusions in order to facilitate meaningful review." *Christephore v. Comm'r of Soc. Sec.*, No. 11-13547, 2012 WL 2274328, at *6 (E.D. Mich. June 18, 2012) (citing *Reynolds v. Comm'r of Soc. Sec.*, 424 F. App'x 411, 416 (6th Cir. 2011)). A claimant must satisfy all of the criteria to meet a listing, or have impairments that are medically equivalent to or equal in severity and duration to the criteria of a listed impairment. *Id.*; *Rabbers v. Comm'r*, 582 F.3d 647, 653 (6th Cir. 2009). "Moreover, all of the criteria must be met concurrently for a period of twelve continuous

months." *McKeel v. Comm'r of Soc. Sec.*, No. 14-cv-12815, 2015 WL 3932546, at*8 (E.D. Mich. June 26, 2015) (citing 20 C.F.R. § 404.1525(c)(3), (4); 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.00D ("[b]ecause abnormal physical findings may be intermittent, their presence over a period of time must be established by a record of ongoing management and evaluation")). It is the claimant's burden to demonstrate that she meets or equals a listed impairment at the third step of the sequential evaluation process. *Foster v. Halter*, 279 F.3d 348, 354 (6th Cir. 2001). ("A claimant must demonstrate that her impairment satisfies the diagnostic description for the listed impairment in order to be found disabled thereunder.").

Under Listing 1.04, disorders of the spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture) are defined as those:

> resulting in compromise of a nerve root (including the cauda equina) or the spinal cord. With:
>
> > A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine); or

> B. Spinal arachnoiditis, confirmed by an operative note or pathology report of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than once every 2 hours; or
>
> C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain and weakness, and resulting in inability to ambulate effectively, as defined in 1.00B2b.

20 C.F.R. Part 404, Subpart P, Appendix 1, Section 1.04. For a disorder of the spine to meet Listing 1.04A, "the simultaneous presence of all of the medical criteria in paragraph A must continue, or be expected to continue, for a continuous period of at least 12 months." Social Security Acquiescence Ruling (AR) 15-1(4), 80 FR 57418-02, 2015 WL 5564523, at *57420 (Sept. 23, 2015) (citing 20 C.F.R. §§ 404.1525(c)(4), 416.925(c)(4)). Stated differently, when the paragraph A criteria "are scattered over time, wax and wane, or are present on one examination but absent on another, the individual's nerve root compression would not rise to the level of severity required by listing 1.04A." *Id.*

Here, the ALJ found that Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments. (TR 725.) With regard to Listing 1.04, the ALJ explained:

> The degenerative disc disease does not meet or medically equal listing 1.04 because the claimant lacks the requisite motor and sensory deficits, and there is no evidence of spinal arachnoiditis or spinal stenosis resulting in pseudoclaudication. This finding is supported by the opinion of medical expert, Dr. Barnes, who testified that, in his opinion, the claimant did not meet or equal a medical listing. The undersigned gives significant weight to this opinion from Dr. Barnes, as it is consistent with the evidence in the record. Namely, in supporting this opinion, Dr. Barnes indicated that positive straight leg raising was not found on most of the examinations, as will be discussed in more detail below. Furthermore, Dr. Barnes noted that the physical findings of numbness, reflex changes, and atrophy were not consistently present over a 12-month period, consistent with the medical records. In addition, the MRI findings in the record, as discussed below, reflect only mild-to-moderate degenerative changes with no more than mild stenosis (Exhibits B2F/9, B12F/6, B22F/45, and B30F/22).

In making this finding regarding listing 1.04, the undersigned give [sic] little weight to the medical opinion of Alexander J. Ghanayem, M.D., who opined that the claimant "met and exceeded the criteria set forth for disability related to disorders of the spine as listed in section 1.04" (Exhibit B43F). Dr. Ghanayem noted "in 2005 he had significant lumbar spine disc disease"; however, the radiologist noted in August 2005 that the claimant had "mild degenerative disc disease and facet osteoarthritis" (Exhibit B38F/3). The doctor then noted that, by December 2009, the claimant's lumbar spine "showed significant and diffuse evidence of lumbar disc disease"; yet, the MRI study dated December 05, 2009, and re-interpreted on January 19, 2010 revealed no more than moderate abnormalities with no evidence of spinal canal stenosis, neural foramina stenosis, or disc protrusion (Exhibits B2F/9 and B12F/6). Mild-to-moderate degenerative changes were seen on a 2013 lumbar spine MRI, and an October 2014 MRI revealed only mild central canal stenosis (Exhibits B22F/45 and B30F/22). Dr. Ghanayem's opinion is contrary to the objective findings of multiple radiologists who reviewed the claimant's images. The undersigned also notes that Dr. Ghanayem only reviewed the claimant's medical records and never had the opportunity to

> examine, or even meet with and question, the claimant (Exhibit B43F).

(TR 725.)

Plaintiff argues that the ALJ erred in adopting the opinion of Dr. Barnes over that of Dr. Ghanayem. (Docket no. 22 at 4.) Plaintiff also argues that even if he cannot demonstrate that that he meets Listing 1.04A, Dr. Ghanayem testified that Plaintiff's impairments "more than equaled" the Listing. (Docket no. 25 at 1.) "However, the ALJ has the right to resolve conflicting respectable medical opinions." *Morreale v. Heckler*, 595 F. Supp. 907, 910 (E.D. Mich. 1984) (citing *LeMaster v. Weinberger*, 533 F.2d 337, 349 (6th Cir. 1976); *Halsey v. Richardson*, 441 F.2d 1230 (6th Cir. 1971)). *See also Foster v. Halter*, 279 F.3d 348, 353 (6th Cir. 2001) (It is not the court's role to resolve conflicting evidence in the record.). While the ALJ's notation that Dr. Ghanayem did not personally examine Plaintiff is questionable, particularly where Dr. Barnes also did not personally examine Plaintiff, it does not constitute a significant legal error requiring remand. Here, there is substantial evidence in the record that supports the ALJ's decision that Plaintiff did not meet or medically equal Listing 1.04, including the MRI reports, which the ALJ accurately cited as revealing only mild-to moderate degenerative changes; the objective medical evidence revealing the lack of a simultaneous presence of the paragraph A criteria (TR 245-46, 250, 252, 255, 285, 328-330, 410, 412, 414, 469, 486, 590, 636, 639, 1554, 1570, 1609, 1617, 1914, 1922-23, 1931, and 1957); and Dr. Barnes's opinion, upon which the ALJ was entitled to rely. Although there is also record evidence, including Dr.

Ghanayem's opinion, that tends to support Plaintiff's assertions, the ALJ's step-three determination is supported by substantial evidence, and it must be affirmed. *See Her v. Comm'r*, 203 F.3d at 389-90. Therefore, Plaintiff's Motion should be denied with regard to this issue.

2. The ALJ's Assessment of the Medical Opinion Evidence

Next, Plaintiff argues that the ALJ improperly evaluated the medical opinion evidence, specifically that of his treating physician, Dr. Wright, consultative examiner Dr. Jack Salomon, and the non-examining medical experts, Dr. Barnes and Dr. Ghanayem. (Docket no. 22 at 7-15.)

a. Dr. Wright

It is well settled that the opinions of treating physicians are generally accorded substantial deference. In fact, the ALJ must give a treating physician's opinion complete deference if it is supported by clinical and laboratory diagnostic evidence and it is not inconsistent with the other substantial evidence in the record. 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2). When an ALJ determines that a treating source's medical opinion is not controlling, he must determine how much weight to assign that opinion in light of several factors: (1) length of the treatment relationship and the frequency of examination; (2) nature and extent of the treatment relationship; (3) supportability of the opinion; (4) consistency of the opinion with the record as a whole; (5) specialization of the treating source; and (6) other factors. 20 C.F.R. §§ 404.1527(c)(2)-(6), 416.927(c)(2)-(6).

There is no *per se* rule that requires an articulation of each of the six regulatory factors listed in 20 C.F.R. §§ 404.1527(c)(2)-(6), 416.927(c)(2)-(6). *Norris v. Comm'r of Soc. Sec.*, No. 11-CV-11974, 2012 WL 3584664, at *5 (E.D. Mich. Aug. 20, 2012) (citing *Tilley v. Comm'r of Soc. Sec.*, 394 F. App'x 216, 222 (6th Cir. 2010)). An ALJ's failure to discuss the requisite factors may constitute harmless error (1) if "a treating source's opinion is so patently deficient that the Commissioner could not possibly credit it;" (2) "if the Commissioner adopts the opinion of the treating source or makes findings consistent with the opinion;" or (3) "where the Commissioner has met the goal of [§ 1527(c)]—the provision of the procedural safeguard of reasons—even though she has not complied with the terms of the regulation." *Nelson v. Comm'r of Soc. Sec.*, 195 F. App'x 462, 470 (6th Cir. 2006) (quoting *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 547 (6th Cir. 2004)).

The Commissioner requires its ALJs to "always give good reasons in [their] notice of determination or decision for the weight [they] give [a] treating source's opinion." 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2). Those good reasons must be "supported by the evidence in the case record, and must be sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the treating source's medical opinion and the reasons for that weight." *Wilson*, 378 F.3d at 544 (quoting SSR 96-2p, 1996 WL 374188, at *5 (1996)). The district court should not hesitate to remand when the Commissioner has failed to identify the weight assigned to a treating physician's opinion and provide good reasons for that weight. *See Cole v. Astrue*, 661

F.3d 931, 939 (6th Cir. 2011) ("This Court has made clear that '[w]e do not hesitate to remand when the Commissioner has not provided 'good reasons' for the weight given to a treating physician's opinion and we will continue remanding when we encounter opinions from ALJ's that do not comprehensively set forth the reasons for the weight assigned to a treating physician's opinion.") (citing *Hensley v. Astrue*, 573 F.3d 263, 267 (6th Cir. 2009)).

Plaintiff treated with Harold M. Wright, DO from October 2012 to April 2013. (TR 1552-71.) On April 25, 2013 and October 7, 2013, Dr. Wright completed substantially similar Medical Examination Reports with regard to Plaintiff, in which he opined that Plaintiff could lift less than 10 pounds occasionally but never more than 10 pounds; stand and/or walk for less than 2 hours in an 8-hour workday, sit for less than six hours in an 8-hour workday; use his arms for simple grasping and reaching but never for pushing, pulling, or fine manipulating; and operate foot/leg controls. (TR 1592-94, 1945-47.) Dr. Wright also opined that Plaintiff was limited in comprehension, memory, sustaining concentration, following simple directions, reading and writing, and social interaction. (*Id.*) Dr. Wright then completed a Physical Residual Functional Capacity Questionnaire with regard to Plaintiff on July 10, 2015. (TR 1888-96.) In this report, Dr. Wright opined that Plaintiff could occasionally lift less than 10 pounds but never more than 10 pounds; could sit or stand for only 10 minutes at time; could sit for less than 2 hours total in an 8-hour workday; could stand for less than 2 hours in an 8-hour workday; would need to walk around every 10 minutes in an 8-hour

workday for 5 minutes each time; would need to take 20-30 minute breaks every 10-15 minutes; would need a cane to ambulate; would be incapable of performing even low stress jobs; and would never be able to twist, stoop, crouch, or climb ladders or stairs, among other things.

> The ALJ summarized Dr. Wright's opinions and then assessed them as follows:
>
> The undersigned gives minimal weight to Dr. Wright's opinions for numerous reasons. First, despite preparing the most recent disabling opinion in July 2015, the doctor admitted to not having seen the claimant since April 2013, or over two years prior (Exhibit B31F/1). Moreover, the objective medical evidence in the record does not support the significant limitations proposed by Dr. Wright. Most notably, the numerous MRI studies showed no more than mild-to-moderate degenerative findings, which is inconsistent with Dr. Wright's suggestions.

(TR 734.)

"A physician qualifies as a treating source if the claimant sees her 'with a frequency consistent with accepted medical practice for the type of treatment and/or evaluation required for [the] medical condition.'" *Smith v. Comm'r of Soc. Sec.*, 482 F.3d 873, 876 (6th Cir. 2007) (alteration in original) (quoting 20 C.F.R. § 404.1502). Dr. Wright certainly qualified as Plaintiff's

treating physician from October 2012 to April 2013; thus, his April 2013 opinion qualifies as that of a treating physician and is generally entitled to substantial deference. Also, the undersigned concludes that his October 2013 opinion is not so far removed from the period of treatment to prevent it from being considered as a treating physician's opinion. But, it is undisputed that Dr. Wright had not treated Plaintiff for over two years when he rendered his July 2015 opinion. It would be inconsistent with the "ongoing treatment relationship" requirement of 20 C.F.R. § 404.1502 to treat that opinion as one authored by a treating physician. *See Tate v. Comm'r of Soc. Sec.*, 467 F. App'x 431, 433 (6th Cir. 2012). Accordingly, the ALJ properly discounted Dr. Wright's July 2015 opinion on this basis.

That being said, Dr. Wright's April and October 2013 opinions were entitled to controlling weight as long as they were "well-supported by medically acceptable clinical and laboratory diagnostic techniques" and "not inconsistent with the other substantial evidence in [the] case record." 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2). Plaintiff argues that Dr. Wright's opinions are entitled to deference because Dr. Wright was well aware of Plaintiff's conditions and treatment, particularly the treatment that Plaintiff underwent to alleviate his pain. (Docket no 22 at 8.) Plaintiff further argues that Dr. Wright's opinions are consistent with and were bolstered by the testimony of the non-examining medical expert, Dr. Ghanayem. (*Id.* at 8-9.) But Plaintiff's reliance on opinion evidence to support his argument in this regard does not defeat the ALJ's finding that Dr. Wright's opinions were inconsistent with the objective

medical evidence, specifically, the results of Plaintiff's MRIs, which constitute substantial evidence in this matter. The ALJ did not err in discounting Dr. Wright's April and October 2013 opinions as inconsistent with the mild-to-moderate MRI results. Based on the discussion above, the undersigned concludes that the ALJ provided good reasons for assigning little weight to Dr. Wright's opinions, which reasons are supported by the evidence of record and are sufficiently specific to clarify the reasons for that weight. Plaintiff's Motion should be denied with regard to this issue.

b. Dr. Salomon

Next, Plaintiff argues that the ALJ erred by assigning little weight to the opinion of consultative examiner Jack Salomon, M.D. and instead assigning great weight to the opinion of the non-examining medical expert, Dr. Barnes. (Docket no. 22 at 9-10.) Dr. Salomon conducted a physical evaluation of Plaintiff on July 2, 2013, with regard to Plaintiff's alleged disability. (TR 1615-21.) The parties do not dispute that Dr. Salomon was not a treating physician, as he only examined Plaintiff once on a consultative basis. The ALJ is not bound by a non-treating physician's opinion. *McKivens v. Comm'r*, No. 11-cv-14268, 2012 WL 3263847, at *11 (E.D. Mich. Jul. 9, 2012) (citation omitted). However, "[w]hen no treating physician opinion has been granted controlling weight ... the medical opinion of a consultative examiner is to be weighed considering all of the factors identified in 20 C.F.R. § 404.1527(c)(1) through (6)." *Id.* (citing 20 C.F.R. § 404.1527(e)(2)(iii)). Nevertheless, there is no per se rule that requires an articulation of each of the six

regulatory factors listed in 20 C.F.R. § 404.1527(c). *Norris v. Comm'r*, No. 11- CV-11974, 2012 WL 3584664, at *5 (E.D. Mich. Aug. 20, 2012) (citing *Tilley v. Comm'r*, 394 Fed. Appx. 216, 222 (6th Cir. 2010)).

Upon examining Plaintiff, Dr. Salomon rendered the following assessment: "Mr. Biestek probably has hepatitis C. He has lumbar radiculopathy. He may have some other problems also. At this time, he is not very functional. (TR 1617.) The ALJ evaluated Dr. Salomon's assessment as follows:

> At the conclusion of the consultative examination, Dr. Salomon opined that the claimant was "not very functional" (Exhibit B23F/3). The undersigned gives little weight to Dr. Salomon's opinion, as he does not give specific functional limitations but merely makes a blanket statement. Moreover, Dr. Salomon only examined the claimant on one occasion, and thus, has no treating relationship with the claimant. Although Dr. Salomon found positive straight leg raising upon examination, the diagnostic findings on the various MRIs do not support the disabling statement from the examiner.

(TR 734.) Here, the ALJ appropriately considered and discussed some of the regulatory factors in weighing Dr. Salomon's assessment. And to the extent that Dr. Salomon's vague statement that Plaintiff is "not very functional" constitutes a medical opinion under the regulations, the ALJ's failure to adopt Dr. Salomon's "opinion" is harmless because it is patently deficient

with regard to any functional limitations related thereto. *See* 20 C.F.R. §§ 404.1527(a)(1), 416.927(a)(1); Nelson, 195 F. App'x at 470. Moreover, Plaintiff does not allege any additional functional limitations that he believes the ALJ should have included based on Dr. Salomon's report. Therefore, Plaintiff's Motion should be denied in this regard.

c. Drs. Ghanayem and Barnes

First, with regard to Dr. Ghanayem, Plaintiff alleges that although the ALJ permitted Dr. Ghanayem to testify at the hearing regarding his previously-submitted written opinion, the ALJ erred by depriving Plaintiff of the ability to use Dr. Ghanayem as rebuttal evidence to the testimony of Dr. Barnes. (Docket no. 22 at 10-13.) Plaintiff relies on several authorities to support his argument: POMS § DI 27540.001; the Administrative Procedure Act (APA), 5 U.S.C. § 556(d); 20 C.F.R. § 404.929; 20 C.F.R. 404.950(a); and HALLEX I-2-6-60. POMS § DI 27540.001, however, is inapplicable to this matter, as it applies to proceedings in which the SSA plans to re-open the case of an individual who is already receiving disability benefits.

The APA provides that "[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d). As Defendant points out, however, this provision does not dictate the time and manner of rebuttal. (Docket no. 23 at 17.) In fact, the APA further provides that in determining claims for benefits, "an agency may, when a party will not be prejudiced thereby, adopt procedures

for the submission of all or part of the evidence in written form." 5 U.S.C. § 556(d). Accordingly, Plaintiff's argument that he should have been able to present rebuttal evidence at the hearing through Dr. Ghanayem's testimony is not supported by the APA. Notably, there is no evidence that Plaintiff sought to present his rebuttal evidence in any other manner.

The social security regulations also do not support Plaintiff's argument. 20 C.F.R. § 404.929 provides that a claimant may present and question witnesses at the hearing before the ALJ, but it does not provide any guidance regarding rebuttal evidence. 20 C.F.R. § 404.950(a) states that any party to a hearing has a right to appear before the ALJ to present evidence and state his or her position. Again, this regulation does not specifically address rebuttal evidence. Notably, neither of these regulations specifies that an ALJ's decision to disallow rebuttal evidence at the hearing constitutes legal error.

HALLEX I-2-6-60, which governs the testimony of claimants and witnesses, provides, in relevant part, that

> The ALJ determines the subject and scope of testimony from a claimant and any witness(es), as well as how and when the person testifies at the hearing. . . . If a claimant or witness requests to testify in a particular way, or asks to testify at a particular time during the hearing, the ALJ will consider whether there is a good reason for the request. . . . If the ALJ does not grant the request, the ALJ will either

> deny the request in writing before the hearing (and exhibit the document) or deny the request on the record during the hearing. In either circumstance, the ALJ will explain the reason(s) he or she denied the request.

Plaintiff argues that the ALJ offered no reasons for denying his request to present Dr. Ghanayam as a rebuttal witness at the hearing. (Docket no. 22 at 12.) Plaintiff is incorrect. At the hearing, the ALJ informed Plaintiff's attorney that her procedure was to direct questions selected from a pre-approved list to the medical expert and then provide the attorney with the opportunity to ask that witness questions. (TR 881.) The ALJ advised that she would not engage in a discussion among professionals. (TR 881.) The ALJ's actions in this regard are consistent with HALLEX I-2-6-70, which governs medical expert (ME) testimony and provides that "[t]he claimant and the representative have the right to question the ME fully on any pertinent matter within the ME's area of expertise. However, the ALJ will determine when they may exercise this right and whether questions asked or answers given are appropriate." Accordingly, Plaintiff's argument fails in this regard.

Next, Plaintiff argues that the ALJ erred by only evaluating Dr. Ghanayem's opinion at step three of the sequential evaluation process and failing to make any mention of Dr. Ghanayem's opinion in the RFC determination. (Docket no. 22 at 13.) Plaintiff argues in this regard that Dr. Ghanayem explained in his letter opinion that Plaintiff's subjective complaints

documented in the medical records were consistent with the nature of Plaintiff's condition and would render Plaintiff disabled. Plaintiff adds that Dr. Ghanayem testified at the hearing that statements of sitting or standing were reasonable and that the fact that Plaintiff needed to lie down or elevate his legs was entirely consistent with his pathology. Plaintiff argues that the ALJ's failure to mention this evidence warrants remand.

"[I]t is well settled that '[a]n ALJ can consider all the evidence without directly addressing in his written decision every piece of evidence submitted by a party.'" *Kornecky v. Comm'r of Soc. Sec.*, 167 F. App'x 496, 507-08 (6th Cir. 2006) (quoting *Loral Def. Sys.-Akron v. N.L.R.B.*, 200 F.3d 436, 453 (6th Cir. 1999)). Here, the record demonstrates that the ALJ did in fact consider both the letter opinion and the testimony presented by Dr. Ghanayem, as she presided over the hearing at which Dr. Ghanayem testified, and she indicated at that hearing that she "really did understand [Dr. Ghanayem's] letter very clearly." (TR 883.) Thus, the ALJ's failure to explicitly discuss the evidence cited by Plaintiff above in the decision does not constitute reversible error. Furthermore, the ALJ sufficiently discussed her reasons for assigning little weight to Dr. Ghanayem's opinion at step-three of the sequential evaluation process, and her failure to repeat those reasons later in her decision was not erroneous.

With regard to Dr. Barnes, Plaintiff argues that the ALJ erred by assigning his opinion great weight while failing to account for all of the functional limitations he assessed in Plaintiff's RFC. (Docket no. 22 at 14-15.) There is only one limitation specifically

assessed by Dr. Barnes that the ALJ did not incorporate fully into the RFC – that Plaintiff would not be able to bend over at the waist to pick up ten pounds. (TR 906.) But an ALJ is not required to adopt all of a non-examining source's findings, even if the ALJ gives the opinion great weight. *See Smith v. Comm'r of Soc. Sec.*, Case No. 5:11 CV 2104, 2013 WL 1150133, at *11 (N.D. Ohio Mar. 19, 2013) ("Simply put, there is no legal requirement for an ALJ to explain each limitation or restriction he adopts or, conversely, does not adopt from a non-examining physician's opinion, even when it is given significant weight."). For the reasons stated above, Plaintiff's Motion regarding the ALJ's assessment of the medical opinion evidence should be denied.

3. The ALJ's Assessment of Plaintiff's Limitations in Concentration, Persistence, or Pace

Plaintiff argues that the ALJ failed to adequately account for Plaintiff's moderate limitations in concentration, persistence, or pace in Plaintiff's RFC and in her hypothetical question to the VE. (Docket no. 22 at 15-17.) Specifically, Plaintiff argues that the ALJ's RFC and hypothetical question limiting Plaintiff to "simple, routine tasks" at the SVP 1 or 2 level essentially limited Plaintiff to unskilled work, and the skill level of a job does not necessarily relate to the difficulty an individual would have in meeting the demands of the job, including how quickly the individual could meet those demands. (Docket no. 22 at 15-16.) As Defendant points out, however, "[c]ase law in this Circuit does not support

a rule that a hypothetical providing for simple, unskilled work is per se insufficient to convey moderate limitations in concentration, persistence and pace." (Docket no. 23 at 22 (quoting *Kepke v. Comm'r of Soc. Sec.*, 636 F. App'x 625, 635 (6th Cir. 2016).) *See also Lewicki v. Comm'r of Soc. Sec.*, No. 09- 11844-BC, 2010 WL 3905375, at *2 (E.D. Mich. Sept. 30, 2010) (citations omitted) (Findings of moderate limitations in concentration, persistence, or pace do not necessarily preclude "simple, routine, unskilled work.").

Courts in this district draw a distinction between cases in which a medical expert finds a moderate deficiency in concentration, persistence, or pace from those in which the ALJ independently finds such a limitation. "When the ALJ has found such a limitation, the ALJ must incorporate these limitations into the hypothetical questions." *McPhee v. Comm'r of Soc. Sec.*, No. 11-13399, 2013 WL 1277889, at *2 (E.D. Mich. Mar. 27, 2013) (citations omitted). Courts are more likely to order a sentence-four remand in cases where the ALJ made the finding of moderate deficiencies in concentration, persistence, or pace in the absence of a medical opinion that found similar moderate deficiencies and indicated that the plaintiff was still capable of sustained work. *Cwik v. Comm'r of Soc. Sec.*, No. 10-15121, 2012 WL 1033578, at *10 (E.D. Mich. Feb. 23, 2012) (citing *Hicks v. Comm'r of Soc. Sec.*, No. 10-13643, 2011 WL 6000701, at *4 (E.D. Mich. Nov. 28, 2011)).

Here, the ALJ did not make an independent decision regarding Plaintiff's ability to maintain concentration, persistence, or pace. In fact, the ALJ relied upon the opinion of Dr. Hugh Bray, Ph.D., LP in

making such a determination. (TR 727 (citing TR 1624-26).) Dr. Bray conducted a consultative evaluation of Plaintiff's mental status on July 11, 2013, after which he found that Plaintiff's mental abilities to relate to others, to understand, remember, and carry out tasks, to maintain concentration, persistence, pace, and effort, and to withstand stress and pressure associated with day to day work activities were moderately impaired. (TR 1623-27.) Despite these findings, Dr. Bray opined that Plaintiff was able to perform simple, repetitive tasks and that he could likely handle more complex tasks, although he may have moderate difficulty in performing multiple-step tasks. (TR 1626.) Notably, Dr. Bray did not assess any additional functional limitations related to his findings, including the finding that Plaintiff had moderate limitations in maintaining concentration, persistence, or pace. The ALJ then discussed and assigned great weight to Dr. Bray's opinion, and incorporated the limitations assessed by Dr. Bray into Plaintiff's RFC by limiting him to work involving:

> simple, routine tasks such as those jobs at the SVP 1 or 2 level due to pain, fatigue, and depression causing occasional limitations in ability to maintain concentration for extended periods, but not off task for more than 10% of the workday, as well as occasional limitations in ability to carry out detailed instructions; . . . and [he] is limited to brief and superficial interaction (i.e. infrequent and not very involved) with the public, coworkers, and supervisors.

(TR 728, 733.)

The ALJ also relied upon and assigned great weight to the opinion of Dr. Edward Czarnecki, Ph.D., the non-examining state-agency consultant who made an unfavorable disability determination in this matter on July 23, 2013. (TR 735, 953-68.) In making that determination, Dr. Czarnecki assessed moderate difficulties in Plaintiff's ability to maintain concentration, persistence, or pace, yet he found that Plaintiff continued to retain the mental capacity for simple, rote, repetitive, unskilled work-related activity. (TR 961, 966.)

The discussion above demonstrates that the ALJ relied upon and adopted the opinions of two medical sources that assessed Plaintiff's moderate difficulties in maintaining concentration, persistence, and pace, and found that Plaintiff was still able to engage in substantial gainful activity, albeit with limitations. The ALJ then incorporated those limitations into Plaintiff's RFC and the hypothetical questions that she posed to the VE, to which the VE responded that there were jobs existing in significant numbers in the national economy that Plaintiff could perform. (TR 855-62.) There is no error here on the part of the ALJ, as the ALJ appropriately accommodated for Plaintiff's limitations in concentration, persistence, or pace in the RFC and the hypothetical questions. It is therefore recommended that Plaintiff's Motion for Summary Judgment on this issue be denied.

4. The ALJ's Credibility Assessment

Plaintiff asserts that the ALJ erred in assessing Plaintiff's credibility and in rejecting the statements of Plaintiff's mother, Rita Biestek. (Docket no. 22 at 17-22.) "[A]n ALJ's findings based on the credibility of the applicant are to be accorded great weight and deference, particularly since an ALJ is charged with the duty of observing a witness's demeanor and credibility." *Walters v. Comm'r*, 127 F.3d 525, 531 (6th Cir. 1997). But credibility assessments are not insulated from judicial review. Despite the deference that is due, such a determination must nevertheless be supported by substantial evidence. *Id.* An ALJ's credibility determination must contain "specific reasons . . . supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight." SSR 96–7p.[1] "It is not sufficient to make a conclusory statement that 'the individual's allegations have been considered' or that 'the allegations are (or are not) credible.'" *Id.* "[T]he adjudicator may find all, only some, or none of an individual's allegations to be credible" and may also find the statements credible to a certain degree. *Id.*

Further, to the extent that the ALJ found that Plaintiff's statements are not substantiated by the

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[1] SSR 96-7p has been superseded by SSR 16-3p, effective March 28, 2016. *See* SSR 16-3p, 2016 WL 1119029, at *1; 2016 WL 1237954. Nevertheless, because the ALJ's decision in this matter was rendered prior to the effective date of SSR 16-3p, the ALJ was obligated to comply with SSR 96-7p. *See Combs v. Comm'r of Soc.*

objective medical evidence in the record, the Regulations explicitly provide that "we will not reject your statements about the intensity and persistence of your pain or other symptoms or about the effect your symptoms have on your ability to work solely because the available objective medical evidence does not substantiate your statements." 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2). The ALJ will consider: (1) the claimant's daily activities, (2) the location, duration, frequency, and intensity of the claimant's pain or other symptoms, (3) precipitating and aggravating factors; (4) the type, dosage, effectiveness, and side effects of any medication taken to alleviate pain or other symptoms, (5) treatment, other than medication, for symptom relief, (6) any measures used to relieve the symptoms, and (7) functional limitations and restrictions due to the pain or other symptoms. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3); SSR 96-7p; *see also Felisky v. Bowen*, 35 F.3d 1027, 1039-40 (6th Cir. 1994) (applying these factors).

Here, the ALJ considered and discussed Plaintiff's hearing testimony and other subjective complaints in conjunction with the record evidence, and she found that Plaintiff's allegations were not entirely credible. (TR 729.) The ALJ explained this assessment as follows:

> In assessing the credibility of the claimant, the undersigned notes that the treatment for his various impairments

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Sec., 459 F.3d 640, 642 (6th Cir. 2006) ("The Act does not generally give the SSA the power to promulgate retroactive regulations.")

were [sic] described as being relatively effective in controlling his symptoms. For instance, in January 2011, he reported that "Demerol help[ed] his pain" (Exhibit B13F/6). The claimant received bilateral medial branch blocks on April 6, 2011, and indicated that his pain level was 1/10 in severity (Exhibits B11F/27 and B20F/16). On January 20, 2012, he reported that physical therapy was helpful and that the injections provided at the prior office visit were "extremely beneficial" (Exhibit B17F/2). On May 22, 2014, the claimant reported that the back injections helped "some" (Exhibit B29F/6). The relative effectiveness of the treatment diminishes the credibility of the completely disabling allegations and supports a finding that he has been capable of performing work within the restricted range of sedentary work identified.

At one point or another in the record (either in forms completed in connection with the application and appeal, in medical reports or records, or in the claimant's testimony), the claimant reported the following daily activities: reading the newspaper, preparing simple meals, visiting his son at least twice a week, driving, taking care of his basic needs on a consistent basis, doing some laundry, shopping, cashing checks,

> providing childcare, watching television, running errands, playing video games, and making appointments (Exhibits B14E, B5F, and B24F/2; testimony). These activities require functioning within the limited range of sedentary work identified.
>
> The undersigned also notes that the claimant has been noncompliant with prescribed treatment. Most notably, records from Hegira reflect numerous no shows and cancelations by the claimant (Exhibits B18F, B21F, B27F, and B28F). Moreover, as of June 18, 2014, he reported only using pain medications "once in a while as needed" (Exhibit B29F/4). The claimant's noncompliance with his treatment suggests that the symptoms may not be as limiting as the claimant has alleged in connection with this application and reflects poorly on the credibility of his allegations.

(TR 735-36.)

Plaintiff raises a few specific issues with regard to the ALJ's credibility analysis. First, Plaintiff claims that the ALJ's characterization of his treatment as "relatively effective" is flawed and that the ALJ played doctor in making such a characterization. (Docket no. 22 at 18-19; docket no. 25 at 7.) Plaintiff's argument lacks merit, as the regulations specifically provide that the ALJ may consider the effectiveness of Plaintiff's treatment, as well as the intensity of his pain in

determining the credibility of Plaintiff's disabling allegations. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3); SSR 96-7p. Plaintiff argues that the ALJ "cherry-picked" the evidence in this regard and points to instances in the record in which his treatment was not effective in controlling his symptoms. (Docket no. 22 at 18-19.) However, as Defendant points out, where there is evidence in the record that tends to support the positions of both parties, "the same process can be described more neutrally as weighing the evidence." (*See* docket no. 23 at 24 (quoting *White v. Comm'r of Soc. Sec.*, 572 F.3d 272, 284 (6th Cir. 2009)).) Here, the ALJ properly cited to the evidence in the record that explains her reasons for finding Plaintiff's disabling statements to be not entirely credible in accordance with her duty to do so under SSR 96-7p.

Next, Plaintiff argues that the ALJ inappropriately characterized his daily activities, relying on the Sixth Circuit's decision in *Rogers v. Comm'r of Soc. Sec.*, 486 F.3d 234, 248-49 (6th Cir. 2007) for the principle that minimal daily activities are not comparable to typical work activities. (Docket no. 22 at 19-20.) The ALJ, however, did not equate Plaintiff's daily activities to work activities; she discounted Plaintiff's disabling statements on the basis that Plaintiff's daily activities "require functioning within the limited range of sedentary work identified." (TR 736.) Moreover, the ALJ did not rely solely on Plaintiff's ability to perform daily activities in determining that Plaintiff is not disabled or in finding that Plaintiff's allegations were not entirely credible. The ALJ relied on several items, such as the objective medical evidence,

the medical opinion evidence, Plaintiff's daily activities, and Plaintiff's treatment, among other things. The ALJ's consideration of Plaintiff's daily activities is not error. To the contrary, the ALJ is required to consider Plaintiff's daily activities as part of her analysis.

Plaintiff also argues that the ALJ erred in discounting his credibility based on his non- compliance with treatment. (Docket no. 22 at 20-21.) To support his argument, Plaintiff cites Dr. Barnes's testimony that he did not find evidence of non-compliance in Plaintiff's file. (*Id.* at 21 (citing TR 904).) But the fact that Dr. Barnes did not find such evidence does not mean that it does not exist. The ALJ specifically identified the records of Plaintiff's numerous no shows and cancellations of his appointments at Hegira as evidence of this non-compliance. (TR 736.) In his brief, Plaintiff cites a lack of medical insurance for his failure to attend these appointments, but the record evidence does not necessarily support Plaintiff's allegation in this regard. (*See, e.g.*, TR 683, 699-700, 709-10, 1725, 1741, 1763, 1779.) The ALJ also cites to Plaintiff's June 18, 2014 report that he was only taking his pain medication as needed as evidence of Plaintiff's non-compliance with treatment. While this report does not necessarily reflect Plaintiff's credibility during the period at issue in this matter, the ALJ did cite to other evidence of Plaintiff's non-compliance with his medication during the relevant period. Specifically, the ALJ pointed out that on September 28, 2012, Plaintiff indicated that he was not telling the nurse practitioner about not taking his medication because he did not want to hurt his chances of getting SSI. (TR 732 (citing 1522).)

The immediate discussion demonstrates that the ALJ set forth numerous legitimate reasons for discrediting Plaintiff's hearing testimony and written statements in her decision, many of which apply the factors set forth in 20 C.F.R. §§ 404.1529(c)(3) and 416.929(c)(3), and SSR 96-7p. Moreover, the ALJ supported her finding that the severity of Plaintiff's subjective complaints was not supported by the objective medical evidence by explicitly discussing and citing to several examples of inconsistency between Plaintiff's complaints and the medical record. Thus, the ALJ's decision is sufficiently specific to make clear to Plaintiff and to the court the weight that she gave to Plaintiff's statements and the reasons for that weight. The ALJ's assessment of Plaintiff's credibility is supported by substantial evidence and should not be disturbed. Because the ALJ's determination that Plaintiff's statements were not entirely credible is supported by substantial evidence, her decision to assign little weight the statements made by Plaintiff's mother, Rita Biestek, on the basis that her statements were consistent with Plaintiff's statements is not erroneous. Plaintiff's Motion should be denied in this regard.

5. The ALJ's Step-Five Determination

Plaintiff argues that the ALJ's step-five determination is not supported by substantial evidence because the VE's testimony upon which she relies appears to be "conjured out of whole cloth." (Docket no. 22 at 22 (quoting *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002)).) As Plaintiff points out, the VE based her testimony regarding off-task tolerance, the sit-stand

option, the use of a cane, and the number of jobs available (issues not addressed by the Dictionary of Occupational Titles (DOT)), on her eleven-year experience as a vocational rehabilitation consultant, which included talking with employers, performing on-the-job analysis, and conducting her own individual labor market surveys. (Docket no. 22 at 23; TR 859, 865-66, 869-71.) After Plaintiff's attorney requested this evidence of the VE's experience, the VE explained that the job analyses were part of "people's private confidential files;" the ALJ then informed Plaintiff's counsel that she would not require the VE to produce the job analyses or the surveys and told counsel that he could appeal the issue if he so desired. (TR 865, 870.)

Plaintiff argues that the ALJ's acceptance and reliance upon the VE's testimony without any supporting evidence or verification of the VE's qualifications constitutes reversible error. (Docket no 22 at 22-24.) Plaintiff relies on Seventh Circuit precedent to support his argument in this regard, including *McKinnie v. Barnhart*, 368 F.3d 907, 911 (7th Cir. 2004) (quoting *Donahue*, 279 F.3d at 446) ("A vocational expert is 'free to give a bottom line,' but the data and reasoning underlying that bottom line must be 'available on demand' if the claimant challenges the foundation of the vocational expert's opinions. 'If the basis of the vocational expert's conclusions is questioned at the hearing . . . then the ALJ should make an inquiry . . . to find out whether the purported expert's conclusions are reliable.'"). As Defendant points out, however, the Sixth Circuit has not adopted the Seventh

Circuit precedent on which Plaintiff relies, and the Court will not do so here.

According to the law of this Circuit, an ALJ is entitled to "rely solely on the vocational expert's testimony," even where that testimony is not based on the DOT, but on the VE's professional experience. *Conn v. Sec'y of Health & Human Servs.*, 51 F.3d 607, 610 (6th Cir. 1995); *Lee v. Comm'r of Soc. Sec.*, 529 F. App'x 706, 715 (6th Cir. 2013). *See also* SSR 00-4P, 2000 WL 1898704, at *2 (S.S.A. Dec. 4, 2000) (Evidence from VEs can include information obtained directly from employers or from a VE's own professional experience.). "Moreover, '[n]othing in SSR 00–4p places an affirmative duty on the ALJ to conduct an independent investigation into the testimony of witnesses to determine if they are correct.'" *Wilson v. Comm'r of Soc. Sec.*, No. 10-13828, 2011 WL 2607098, at *6 (E.D. Mich. July 1, 2011) (quoting *Martin v. Comm'r of Soc. Sec.*, 170 F. App'x 369, 374 (6th Cir. 2006)). Indeed, the ALJ is responsible for determining the credibility of the VE's testimony, and the ALJ's credibility findings are subject to substantial deference on review. *Sias v. Sec'y of Health & Human Servs.*, 861 F.2d 475, 480 (6th Cir. 1988); *King v. Heckler*, 742 F.2d 968, 974 (6th Cir. 1984). Here, the credibility of the VE's testimony was fully probed at the hearing in accordance with the law of this Circuit, the VE testified that her testimony was based upon the DOT and her extensive experience as a vocational rehabilitation consultant, and the ALJ appropriately accepted and relied upon the VE's testimony on this basis. Accordingly, the ALJ did not commit legal error here.

Plaintiff also argues that the VE's descriptions of the jobs available to Plaintiff do not exactly match the job descriptions of the DOT codes provided by the VE. (Docket no. 22 at 25.) Specifically, Plaintiff argues that the VE named the job associated with DOT code 713.687-018 as "bench assembler," but the actual title of this occupation as provided by the DOT is "final assembler," and while the VE named the job associated with DOT code 521.687-086 as "sorter," the actual job title under the DOT is "nut sorter." (*Id.*) Plaintiff's argument in this regard is undeveloped, as it fails to demonstrate that the VE's alleged misstatements amount to any cognizable error. Furthermore, an ALJ "may rely on the testimony of the vocational expert even if it is inconsistent with the job descriptions set forth in the [DOT]." *Conn*, 51 F.3d at 610 (citing *Basinger v. Sec'y of Health and Human Servs.*, 33 F.3d 54 (6th Cir. 1994)).

Plaintiff then questions whether the jobs cited by the VE even exist because the DOT descriptions for these occupations have not been updated since 1977. (Docket no. 22 at 25.) But while the DOT descriptions are not necessarily current, the Social Security Administration continues to rely primarily on the DOT for information about the requirements of work in the national economy in making disability determinations. SSR 00-4P, 2000 WL 1898704, at *2. Therefore, the ALJ and the VE's reliance on the DOT in this regard was not erroneous.

Finally, Plaintiff argues that the ALJ erred by assigning little weight to the vocational opinion of Lee Knutson, which was purportedly obtained by Plaintiff's

counsel in this matter. (Docket no. 22 at 24-25; TR 1296-98.) Plaintiff's argument lacks merit. Mr. Knutson opined regarding occupations that are completely different from those which the ALJ found that Plaintiff can perform. (TR 1297.) The ALJ appropriately found that Mr. Knutson's opinion was irrelevant and assigned it little weight. Plaintiff's Motion regarding the propriety of the ALJ's step-five determination should be denied.

VI. CONCLUSION

For the reasons stated herein, the court should **DENY** Plaintiff's Motion for Summary Judgment (docket no. 22) and **GRANT** Defendant's Motion for Summary Judgment (docket no. 23).

REVIEW OF REPORT AND RECOMMENDATION

Either party to this action may object to and seek review of this Report and Recommendation, but must act within fourteen (14) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing objections which raise some issues but fail to raise others with specificity will not preserve all objections that a party might have to this Report and Recommendation. *Willis v. Sec'y of Health and Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th

Cir. 1987). Pursuant to Rule 72.1(d)(2) of the Local Rules of the United States District Court for the Eastern District of Michigan, a copy of any objection must be served upon this Magistrate Judge.

Within fourteen (14) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

Dated: February 24, 2017 s/ Mona K. Majzoub
MONA K. MAJZOUB
UNITED STATES
MAGISTRATE JUDGE

PROOF OF SERVICE

I hereby certify that a copy of this Report and Recommendation was served upon counsel of record on this date.

Dated: February 24, 2017 / Lisa C. Bartlett
Case Manager

Appendix D

SOCIAL SECURITY ADMINISTRATION
Office of Disability Adjudication and Review

DECISION

IN THE CASE OF	CLAIM FOR
Michael John Biestek (Claimant)	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
_____ (Wage Earner)	[REDACTED] (Social Security Number)

JURISDICTION AND PROCEDURAL HISTORY

This case is before the undersigned Administrative Law Judge on remand from the Appeals Council pursuant to a remand from the United States District Court for the Eastern District of Michigan (Exhibit B12A). On March 25, 2010, the claimant filed a Title II application for a period of disability and disability insurance benefits. The claimant also filed a Title XVI application for supplemental security income on March 25, 2010. In both applications, the claimant alleged disability beginning October 28, 2009. These claims were denied initially on August 17, 2010. Thereafter, the claimant filed a written request for hearing on October 8, 2010 (20

CFR 404.929 et seq. and 416.1429 et seq.). The claimant appeared and testified at a hearing before an Administrative Law Judge (ALJ) on June 24, 2011, in Detroit, Michigan, after which, an unfavorable decision was issued (Exhibit B7A).

The claimant then appealed the unfavorable decision; however, the Appeals Council denied the claimant's request for review on February 21, 2013, thus, making that decision the final decision of the Commissioner (Exhibit B8A). The claimant subsequently filed an action for judicial review in the United States District Court for the Eastern District of Michigan (Exhibit B11A). On May 30, 2014, Magistrate Judge, Mona Majzoub, issued a Report and Recommendation granting the claimant's Motion for Summary Judgment in part and denying it in part (Exhibit B11A). The magistrate's Report and Recommendation indicated that the hearing decision did not include the opinion of a medical expert to confirm that the claimant did not medically equal Listing 1.04 (Exhibit B11A/15). The Report and Recommendation further found that the hearing decision failed to define the duration of the sit/stand option in the residual functional capacity (Exhibit B11A/18).

Magistrate Judge Majzoub denied the claimant's motion regarding issues related to consideration of his hepatitis C, mental restrictions, credibility, and the claimant's mother's opinions (Exhibit B11A). On July 31 2014, Chief Judge Gerald Rosen adopted Magistrate Judge Majzoub's Report and Recommendation and remanded the case to the Commissioner (Exhibit B11A/3-4). The Appeals Council subsequently issued an Order vacating

the decision and remanding the case for further proceedings, consistent with the District Court's Order (Exhibit B12A). The Appeals Council further noted that the claimant filed a subsequent SSI claim on April 2, 2013, which should be consolidated into a single electronic record, with a new decision issued on the consolidated claims (Exhibit B12A).

Upon remand, the claimant appeared and testified at a hearing held on July 21, 2015, in Detroit, Michigan. Also appearing and testifying was Erin O'Callaghan, an impartial vocational expert. A supplemental hearing took place on November 6, 2015, where Frank L. Barnes, an impartial medical expert, appeared and testified by telephone. At the request of the claimant's representative, Alexander J. Ghanayem, M.D., also appeared and testified via telephone at that hearing. The claimant is represented by Frederick J. Daley, Jr, an attorney.

The claimant previously filed Title II and Title XVI applications on February 7, 2007, with an alleged onset date of June 3, 2005. The claim was denied initially, and the claimant filed a request for hearing. After a hearing was held, an unfavorable decision was issued on October 29, 2009, finding the claimant not disabled from June 3, 2005, through the date of the decision (Exhibit B1A). The claimant did not appeal the unfavorable decision, and that unfavorable decision, dated October 29, 2009, became the final decision of the Commissioner, binding on all parties. Accordingly, the issue of disability is *res judicata* through the date of that decision. While the undersigned has considered all of the medical records, the undersigned attributes less weight to the evidence

of disability prior to October 30, 2009, since the issue of disability is *res judicata* up to that date.

As further discussed below, the undersigned finds there has been a change in the claimant's condition since the October 2009 decision, and the substantial evidence of record supports a change in the claimant's residual functional capacity.

ISSUES

The issue is whether the claimant is disabled under sections 216(i), 223(d) and 1614(a)(3)(A) of the Social Security Act. Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or combination of impairments that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months.

With respect to the claim for a period of disability and disability insurance benefits, there is an additional issue whether the insured status requirements of sections 216(i) and 223 of the Social Security Act are met. The claimant's earnings record shows that the claimant has acquired sufficient quarters of coverage to remain insured through December 31, 2010. Thus, the claimant must establish disability on or before that date in order to be entitled to a period of disability and disability insurance benefits.

HOLDING

After careful consideration of all the evidence, the Administrative Law Judge finds that the claimant was

not disabled prior to May [redacted] 2013, but became disabled on that date and has continued to be disabled through the date of this decision. The claimant was not under a disability within the meaning of the Social Security Act at any time through December 31, 2010, the date last insured.

APPLICABLE LAW

Under the authority of the Social Security Act, the Social Security Administration has established a five-step sequential evaluation process for determining whether an individual is disabled (20 CFR 404.1520(a) and 416.920(a)). The steps are followed in order. If it is determined that the claimant is or is not disabled at a step of the evaluation process, the evaluation will not go on to the next step.

At step one, the undersigned must determine whether the claimant is engaging in substantial gainful activity (20 CFR 404.1520(b) and 416.920(b)). Substantial gainful activity (SGA) is defined as work activity that is both substantial and gainful. "Substantial work activity" is work activity that involves doing significant physical or mental activities (20 CFR 404.1572(a) and 416.972(a)). "Gainful work activity" is work that is usually done for pay or profit, whether or not a profit is realized (20 CFR 404.1572(b) and 416.972(b)). Generally, if an individual has earnings from employment or self-employment above a specific level set out in the regulations, it is presumed that he has demonstrated the ability to engage in SGA (20 CFR 404.1574, 404.1575, 416.974, and 416.975). If an individual engages in SGA, he is not disabled regardless of how severe his physical or mental impairments are and regardless of his age, education,

and work experience. If the individual is not engaging in SGA, the analysis proceeds to the second step.

At step two, the undersigned must determine whether the claimant has a medically determinable impairment that is "severe" or a combination of impairments that is "severe" (20 CFR 404.1520(c) and 416.920(c)). An impairment or combination of impairments is "severe" within the meaning of the regulations if it significantly limits an individual's ability to perform basic work activities. An impairment or combination of impairments is "not severe" when medical and other evidence establish only a slight abnormality or a combination of slight abnormalities that would have no more than a minimal effect on an individual's ability to work (20 CFR 404.1521 and 416.921; Social Security Rulings (SSRs) 85-28, 96-3p, and 96-4p). If the claimant does not have a severe medically determinable impairment or combination of impairments, he is not disabled. If the claimant has a severe impairment or combination of impairments, the analysis proceeds to the third step.

At step three, the undersigned must determine whether the claimant's impairment or combination of impairments is of a severity to meet or medically equal the criteria of an impairment listed in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, and 416.926). If the claimant's impairment or combination of impairments is of a severity to meet or medically equal the criteria of a listing and meets the duration requirement (20 CFR 404.1509 and 416.909), the claimant is disabled. If it does not, the analysis proceeds to the next step.

Before considering step four of the sequential evaluation process, the undersigned must first determine the claimant's residual functional capacity (20 CFR 404.1520(e) and 416.920(e)). An individual's residual functional capacity is his ability to do physical and mental work activities on a sustained basis despite limitations from his impairments. In making this finding, the undersigned must consider all of the claimant's impairments, including impairments that are not severe (20 CFR 404.1520(e), 404.1545, 416.920(e), and 416.945; SSR 96-8p).

Next, the undersigned must determine at step four whether the claimant has the residual functional capacity to perform the requirements of his past relevant work (20 CFR 404.1520(f) and 416.920(f)). The term past relevant work means work performed (either as the claimant actually performed it or as it is generally performed in the national economy) within the last 15 years or 15 years prior to the date that disability must be established. In addition, the work must have lasted long enough for the claimant to learn to do the job and have been SGA (20 CFR 404.1560(b), 404.1565, 416.960(b), and 416.965). If the claimant has the residual functional capacity to do his past relevant work, the claimant is not disabled. If the claimant is unable to do any past relevant work or does not have any past relevant work, the analysis proceeds to the fifth and last step.

At the last step of the sequential evaluation process (20 CFR 404.1520(g) and 416.920(g)), the undersigned must determine whether the claimant is able to do any other work considering his residual functional capacity, age,

education, and work experience. If the claimant is able to do other work, he is not disabled. If the claimant is not able to do other work and meets the duration requirement, he is disabled. Although the claimant generally continues to have the burden of proving disability at this step, a limited burden of going forward with the evidence shifts to the Social Security Administration. In order to support a finding that an individual is not disabled at this step, the Social Security Administration is responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that the claimant can do, given the residual functional capacity, age, education, and work experience (20 CFR 404.1512(g), 404.1560(c), 416.912(g) and 416.960(c)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The claimant was born on May [redacted] 1963, and is 52 years old. He was 46 years old on October 28, 2009, the alleged onset date of disability. The claimant has a 12th grade education and past relevant work classified by the vocational expert as a carpenter (scaffold builder) (semi-skilled/medium) (Exhibit B37E/testimony). After careful consideration of the entire record, the undersigned makes the following findings:

1. The claimant meets the insured status requirements of the Social Security Act through December 31, 2010 (B20D).

2. The claimant has not engaged in substantial gainful activity since the alleged onset date (20 CFR 404.1571 *et seq.*, and 416.971 *et seq.*).

3. Since the alleged onset date of disability, October 28, 2009, the claimant has had the following severe impairments: degenerative disc disease, hepatitis C, asthma, and depression (20 CFR 404.1520(c) and 416.920(c)).

The second step of the sequential evaluation involves determining whether the claimant has a severe impairment, which is defined as an impairment or combination of impairments which significantly limits (has more than a minimal effect on) an individual's ability to perform basic work activities. The claimant's above-listed impairments produce limitations which meet this definition of severe, as will be clear from the discussion of the claimant's residual functional capacity later in this decision.

A May 8, 2015, MRI of the left upper extremity showed evidence of a short linear partial thickness intrasubstance tear of the infraspinatus tendon at the footprint (Exhibit B33F/1). However, there is no evidence of further treatment for this impairment since that date or evidence that it was expected to last greater than 12 months. Thus, it is not a severe impairment for purposes of this decision.

4. Since the alleged onset date of disability, October 28, 2009, the claimant has not had an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926).

The degenerative disc disease does not meet or medically equal listing 1.04 because the claimant lacks the requisite motor and sensory deficits, and there is no evidence of spinal arachnoiditis or spinal stenosis resulting in pseudoclaudication. This finding is supported by the opinion of medical expert, Dr. Barnes, who testified that, in his opinion, the claimant did not meet or equal a medical listing. The undersigned gives significant weight to this opinion from Dr. Barnes, as it is consistent with the evidence in the record. Namely, in supporting this opinion, Dr. Barnes indicated that positive straight leg raising was not found on most of the examinations, as will be discussed in more detail below. Furthermore, Dr. Barnes noted that the physical findings of numbness, reflex changes, and atrophy were not consistently present over a 12-month period, consistent with the medical records. In addition, the MRI findings in the record, as discussed below, reflect only mild-to-moderate degenerative changes with no more than mild stenosis (Exhibits B2F/9, B12F/6, B22F/45, and B30F/22).

In making this finding regarding listing 1.04, the undersigned give little weight to the medical opinion of Alexander J. Ghanayem, M.D., who opined that the claimant "met and exceeded the criteria set forth for disability related to disorders of the spine as listed in section 1.04" (Exhibit B43F). Dr. Ghanayem noted "in 2005 he had significant lumbar spine disc disease"; however, the radiologist noted in August 2005 that the claimant had "mild degenerative disc disease and facet osteoarthritis" (Exhibit B38F/3). The doctor then noted that, by December 2009, the claimant's lumbar spine

"showed significant and diffuse evidence of lumbar disc disease"; yet, the MRI study dated December 05, 2009, and re-interpreted on January 19, 2010, revealed no more than moderate abnormalities with no evidence of spinal canal stenosis, neural foramina stenosis, or disc protrusion (Exhibits B2F/9 and B12F/6). Mild-to-moderate degenerative changes were seen on a 2013 lumbar spine MRI, and an October 2014 MRI revealed only mild central canal stenosis (Exhibits B22F/45 and B30F/22). Dr. Ghanayem's opinion is contrary to the objective findings of multiple radiologists who reviewed the claimant's images. The undersigned also notes that Dr. Ghanayem only reviewed the claimant's medical records and never had the opportunity to examine, or even meet with and question, the claimant (Exhibit B43F).

The record does not show that the claimant has the required FEV_1 values, chronic restrictive ventilator disease with commensurate FVC values, or chronic impairment of gas exchange due to clinically documented pulmonary disease with applicable DLCO or arterial blood gas values that meet listing 3.02 for chronic pulmonary insufficiency (Exhibit B22F/62). Further, the record does not support a finding that the claimant has asthma attacks that meet the listing of 3.03 for asthma.

Moreover, the claimant does not meet listing 5.05 for chronic liver disease. The record does not contain evidence of hemorrhaging from esophageal, gastric, or ectopic varices or from portal hypertensive gastropathy; ascites or hydrothorax not attributable to other causes, present on at least 2 evaluations at least 60 days apart

within a consecutive 6-month period; spontaneous bacterial peritonitis with peritoneal fluid containing an absolute neutrophil count of at least 250 cells/mm3; hepatorenal syndrome with serum creatinine elevation of at least 2 mg/dL, oliguria with 24-hour urine output less than 500 mL, or sodium retention with urine sodium less than 10 mEq per liter; hepatopulmonary syndrome; hepatic encephalopathy; or end stage liver disease.

The severity of the claimant's mental impairments, considered singly and in combination, do not meet or medically equal the criteria of listings 12.04 and 12.06. In making this finding, the undersigned has considered whether the "paragraph B" criteria are satisfied. To satisfy the "paragraph B" criteria, the mental impairments must result in at least two of the following: marked restriction of activities of daily living; marked difficulties in maintaining social functioning; marked difficulties in maintaining concentration, persistence, or pace; or repeated episodes of decompensation, each of extended duration. A marked limitation means more than moderate but less than extreme. Repeated episodes of decompensation, each of extended duration, means three episodes within 1 year, or an average of once every 4 months, each lasting for at least 2 weeks.

In activities of daily living, the claimant has no restrictions. The claimant reported to the consultative mental status examiner in June 2010 that he read the newspaper, prepared simple meals, visited his son at least twice a week, drove, and took care of his basic needs on a consistent basis (Exhibit B5F/2). He also indicated in July 2013 that he did some laundry, shopped, cashed checks, provided childcare, watched television,

ran errands, played video games, and made appointments (Exhibit B24F/2). Therefore, the claimant has no limitations in activities of daily living.

In social functioning, the claimant has mild to moderate difficulties. According to the Field Office Disability Report, the claimant was pleasant and had no discernable issues with talking or answering (Exhibit B1E). He repo1ied to the consultative examiner in June 2010 that he was currently living with his mother, with whom get [sic] got along "okay" (Exhibit B5F/2). Throughout the treatment records from Hegira, he reported isolating himself from others (Exhibits B18F, B21F, B27F, and B28F). He also described difficulty getting along with others in his Function Report (Exhibit B14E). However, he reported he visited his son at least twice a week and shopped in stores. For these reasons, the undersigned finds the claimant has mild limitations in social functioning.

With regard to concentration, persistence, or pace, the claimant has moderate difficulties. The Field Office Disability Report reflects no perceived difficulties in understanding, coherency, or concentrating and indicates that he was well organized and easily answered all questions (Exhibit B1E). Mental status examination in July 2013 revealed adequate contact with reality, intact insight and judgment, cooperative and verbally responsive behavior, good eye contact, logical and organized stream of mental activity, clear and understandable speech, age-appropriate content of communication, no visual or auditory hallucinations, pleasant emotional reaction but tearing up and reserved, depressed mood, and average concentration, attention,

persistence, and effort (Exhibit B24F/2-4). Thus, the undersigned finds the claimant moderately limited with regard to concentration, persistence, or pace.

As for episodes of decompensation, the claimant has experienced one or two episodes of decompensation, which have been of extended duration. Specifically, in December 2010, the claimant was hospitalized for a suicide attempt (Exhibits B13F and B16F). However, the record does not contain evidence of further psychiatric hospitalization, significant changes in dosage or type of psychotropic medications, or other such evidence that constitutes additional episodes of decompensation, each of extended duration.

Because the claimant's mental impairments do not cause at least two "marked" limitations or one "marked" limitation and "repeated" episodes of decompensation, each of extended duration, the "paragraph B" criteria are not satisfied.

The undersigned has also considered whether the "paragraph C" criteria are satisfied. The claimant does not meet the requirements of listing 12.04C because he does not have a medically documented history of a chronic affective disorder of at least 2 years' duration that has caused more than a minimal limitation of ability to do basic work activities, with symptoms or signs currently attenuated by medication or psychosocial support, and one of the following: repeated episodes of decompensation, each of extended duration; or a residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; or

current history of 1 or more years' inability to function outside a highly supportive living arrangement, with an indication of continued need for such an arrangement.

The limitations identified in the "paragraph B" criteria are not a residual functional capacity assessment but are used to rate the severity of mental impairments at steps 2 and 3 of the sequential evaluation process. The mental residual functional capacity assessment used at steps 4 and 5 of the sequential evaluation process requires a more detailed assessment by itemizing various functions contained in the broad categories found in paragraph B of the adult mental disorders listings in 12.00 of the Listing of Impairments (SSR 96-8p). Therefore, the following residual functional capacity assessment reflects the degree of limitation the undersigned has found in the "paragraph B" mental function analysis.

5. After careful consideration of the entire record, the undersigned finds that since October 28, 2009, the claimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 404.1567(a) and 416.967(a) except requires work in a relatively clean air work environment, such as no fumes, gases, concentrated dust or other pollutants; no climbing of ladders, ropes, or scaffolds; no climbing of ramps or stairs; no crawling; occasional stooping, crouching, or kneeling; occasional flexion, extension, or rotation of the neck; no operation at hazardous heights or around dangerous machinery; no operation in temperature extremes; no work in food service or medical assistance areas; requires a sit/stand option at will, but not to exceed 30 minutes at a time in either position; is limited to simple, routine tasks

such as those jobs at the SVP 1or 2 level due to pain, fatigue, and depression causing occasional limitations in ability to maintain concentration for extended periods, but not off task for more than 10% of the workday, as well as occasional limitations in ability to carry out detailed instructions; requires use of a cane for prolonged ambulation; and is limited to brief and superficial interaction (i.e. infrequent and not very involved) with the public, coworkers, and supervisors.

In making this finding, the undersigned has considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence, based on the requirements of 20 CFR 404.1529 and 416.929 and SSRs 96-4p and 96-7p. The undersigned has also considered opinion evidence in accordance with the requirements of 20 CFR 404.1527 and 416.927 and SSRs 96-2p, 96-5p, 96-6p and 06-3p.

The prior finding in the October 2009 decision concerning the claimant's residual functional capacity is binding absent evidence of an improvement or change in condition since the prior hearing. *See, Drummond v Commissioner of Social Security*, 126 F.3d 837 (6th Cir. 1997); Acquiescence Ruling 98-4(6) (SSA must adopt a finding of a claimant's residual functional capacity or other finding required under the applicable sequential evaluation process for determining disability, made in the final decision by an ALJ or Appeals Council on a prior disability claim unless new and additional evidence or changed circumstances provide a basis for a different finding of the claimant's residual functional capacity).

As explained in the analysis below, the undersigned finds that the evidence of record shows that there has been a change in the claimant's condition since the prior decision and that the substantial evidence of record supports the aforementioned residual functional capacity. Specifically, new evidence regarding the claimant's back disorder, asthma, and hepatitis C supports the change in the residual functional capacity to the point where the light exertional level is no longer appropriate.

In considering the claimant's symptoms, the undersigned must follow a two-step process in which it must first be determined whether there is an underlying medically determinable physical or mental impairment(s)—i.e., an impairment(s) that can be shown by medically acceptable clinical and laboratory diagnostic techniques—that could reasonably be expected to produce the claimant's pain or other symptoms.

Second, once an underlying physical or mental impairment(s) that could reasonably be expected to produce the claimant's pain or other symptoms has been shown, the undersigned must evaluate the intensity, persistence, and limiting effects of the claimant's symptoms to determine the extent to which they limit the claimant's ability to do basic work activities. For this purpose, whenever statements about the intensity, persistence, or functionally limiting effects of pain or other symptoms are not substantiated by objective medical evidence, the undersigned must make a finding on the credibility of the statements based on a consideration of the entire case record.

The claimant alleged disability due to degenerative disc disease, hepatitis C, and depression (Exhibit B2E). At the hearing, he testified that he injured himself in 1982 while lifting a television and continued working through 2005. The claimant described a sharp pain in his lower back along with tenseness in the middle back and radiation to the shoulder and neck. He testified that he had to alternate between positions about every 5-10 minutes. The claimant reported that he was scheduled for surgery in July 2015, but he was looking for a second opinion. He also testified to tearing his rotator cuff while reaching for his pillow. The claimant indicated that he shopped once a month with his mother, did laundry about once a week, prepared simple meals, and drove no more than 10-15 minutes at a time. He testified to having hepatitis C that caused symptoms of exhaustion and fatigue. The claimant reported using a cane since 2006 or 2007, noting that he was recently prescribed a walker that was not covered by insurance. He estimated being able to lift 5 pounds of weight. The claimant also testified to having asthma, and he reported last using his inhaler a week prior.

After careful consideration of the evidence, the undersigned finds that the claimant's medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, the claimant's statements concerning the intensity, persistence, and limiting effects of these symptoms are not entirely credible for the reasons explained in this decision.

The medical records support a finding that the restricted sedentary exertional level is most appropriate. According to neurological progress notes from J.U.

DeSousa, M.D., dated October 2, 2009, the claimant was taking Vicodin twice a day, and his quality of life improved, noting that he was doing exercises and playing football with his son (Exhibit B1F/9). Dr. DeSousa advised that he would not suggest surgery (Exhibit B1F/9). An abdominal ultrasound from December 2009 returned negative (Exhibit B1F/23). An MRI of the lumbosacral spine dated December 05, 2009, and re-interpreted on January 19, 2010, revealed moderate spondylosis at L4-L5 and L5-S1 with moderate spondyloarthrosis at L3-L4, L4-L5, and L5-S1; moderate facet joint arthritis at L3-L4, L4-L5, and L5-S1; but no evidence of spinal canal stenosis, neural foramina stenosis, or disc protrusion (Exhibits B2F/9 and B12F/6).

The claimant was seen at the Oakwood Heritage Center Pain Management Center on January 28, 2010, regarding his back pain since 1984 (Exhibit B2F/9). At the time, he was on methadone 10 mg, Flexeril, and Robaxin, and he reported his pain level at 4/10 in severity (Exhibit B2F/10). In February and April 2010, the claimant received lumbar medial branch blocks, and in March 2010, he underwent radiofrequency ablation at multiple lumbar levels (Exhibits B2F/16, 18 and B9F). The claimant was discharged from Dr. DeSousa's care on March 19, 2010 (Exhibit B10F/27).

A liver biopsy from July 2010 revealed evidence of chronic hepatitis C with minimal activity and slight periportal fibrosis (Exhibit B8F/29). The claimant received lumbar epidural injections in October and November 2010 (Exhibit B11F). On January 6, 2011, the claimant was seen at Oakwood Hospital for side effects

from his hepatitis C treatment and back pain, but he was released in stable condition the same day (Exhibits B8F/32 and B13F/1-11). The claimant reported "self-withdrawal from methadone" and that "Demerol help[ed] his pain" (Exhibit B13F/6). Lab results and physical examination were normal except for muscle spasm in the back (Exhibit B14F/5).

The claimant received bilateral medial branch blocks on April 6, 2011, and indicated that his pain level was 1/10 in severity (Exhibits B11F/27 and B20F/16). On April 26, 2011, the claimant indicated that his pain was "much better" after the injections (Exhibit B11F/29). Physical examination on May 6, 2011, revealed negative straight leg raising bilaterally in the supine and sitting positions, slightly decreased motor strength in the right hip flexors and knee extensors, and normal reflexes and sensory modalities (Exhibit B12F/3). The claimant underwent further lumbar radiofrequency ablation in May and July 2011 (Exhibits B11F/39 and B20F/10). Bilateral sacroiliac joint injections were also administered on June 28, 2011 (Exhibit B20F/12).

Another MRI of the lumbar spine from October 26, 2011, showed mild degenerative facet joint changes with no evidence of disc protrusion or spinal stenosis and widely patent neural foramina (Exhibit B20F/3). The claimant received a lumbar spine injection on December 23, 2011, which provided immediate relief (Exhibit B17F/5). On January 20, 2012, he reported feeling better physically and that physical therapy was helpful (Exhibit B17F/2). He also noted that the injections provided at the prior office visit were "extremely beneficial" (Exhibit B17F/2). On April 5, 2012, the claimant was seen by

Mohamad Osman, M.D., of Great Lakes Pain Management, where he was switched to morphine 30 mg, and the Norco 7.5 was increased (Exhibit B20F/9).

An EMG of the lower extremities from May 11, 2012, showed evidence of chronic radiculopathy at L2-L3, L4-L5, and L5-S1 on both sides (Exhibit B17F/18). In May 2012, November 2012, and February 2013, the claimant received lumbar medial branch injections at the facet joints (Exhibit B20F/28-38).

The claimant was seen at the hepatitis clinic on June 12, 2012, where he denied treatment for this condition since 2010 (Exhibit B20F/4). An ultrasound of the abdomen was unremarkable, and a duplex assessment of the hepatic vasculature and portal vein were normal (Exhibit B20F/5).

An October 18, 2012, pulmonary function test showed moderate airway obstruction with marked improvement post bronchodilator (Exhibit B22F/62). As of that date, the claimant was started on Qvar and Ventolin inhalers for asthma (Exhibit B22F/20). He was neurologically intact, and he exhibited normal gait and station (Exhibit B22F/19-20). A renal ultrasound from October 20, 2012, returned negative (Exhibit B22F/61). The claimant began physical therapy on October 30, 2012, for his back pain (Exhibit B22F/57).

Another MRI of the lumbar spine from April 15, 2013, showed mild-to-moderate degenerative change, worst at the L4-L5 and L5-S1 levels (Exhibit B22F/45). Lab results, dated April 25, 2013, showed GFR of 85, reflecting mild chronic kidney disease (Exhibit B22F/26). In April 2013, he received further lumbar

epidural steroid injections followed by transforaminal selective nerve root blocks in July and August 2013 (Exhibit B24F).

The claimant was seen at the liver clinic at U of M hospital regarding his hepatitis C (Exhibit B26F/6). Physical examination was relative [sic] unremarkable, and he was informed that he would not have great progression in the disease over the next few years and could afford to wait for non-interferon treatments (Exhibit B26F/8).

On July 2, 2013, the claimant underwent an internal medicine consultative examination with Jack Salomon, M.D., where physical examination revealed lungs clear to auscultation and percussion, no audible wheezing, no evidence of liver distension or tenderness, no hepatosplenomegaly, no edema, positive straight leg raising bilaterally, negative Phalen's and Tinel's, good grip bilaterally, ability to get on and off the table, ability to heel walk and toe walk with back pain, no need for ambulatory device to help walk, intact deep tendon reflexes, limited range of motion of the lumbar spine and bilateral knees, slightly decreased range of motion of the cervical spine, and normal range of motion of all other tested joints (Exhibit B23F). Dr. Salomon indicated that the claimant had lumbar radiculopathy and probably hepatitis C (Exhibit B23F/3).

At a hepatitis C follow up in April 2014, physical examination was unremarkable (Exhibit B26F/14). The claimant was prescribed an adjustable quad cane for lumbar radiculopathy by Dr. Osman of Great Lakes Pain Management (Exhibit B41F). On May 22, 2014, the claimant reported to Nicholas Packey, D.O., that he was

off methadone and doing well, noting that the back injections helped "some" (Exhibit B29F/6). As of June 18, 2014, he was using pain medications "once in a while as needed" (Exhibit B29F/4). The claimant received additional epidural injections in August 2014 (Exhibit B30F). On September 29, 2014, the claimant reported feeling well with no complaints (Exhibit B29F/2).

An October 19, 2014 lumbar spine MRI showed mild multilevel degenerative disc disease, most pronounced at L4-L5, resulting in mild central canal stenosis (Exhibit B30F/22). Mohammed Zaman, M.D., prescribed the claimant a walker for chronic back pain on November 14, 2014 (Exhibit B41F/1). A cervical spine MRI from December 20, 2014, was essentially unremarkable (Exhibit B33F/5). On May 23, 2015, MRIs of the cervical spine, thoracic spine, and lumbar spine were performed and showed minimal ago[sic]-related height loss of the vertebrae in the lower thoracic spine, linear enhancement within the posterior aspect of the disc at L4-L5 level suggestive of radial tear, and otherwise scattered minimal age-related changes of the cervical, thoracic, and lumbar spine (Exhibit B36F).

A State agency consultant prepared an assessment of the claimant's physical functional capabilities dated July 23, 2013, finding that the claimant could perform work at the light exertional level (Exhibit B9A). The State agency medical consultant's physical assessment is given little weight because evidence received at the hearing level shows that the claimant is more limited than determined by the State agency consultant. Furthermore, the State agency consultant did not adequately consider the claimant's subjective

complaints. Specifically, considering the claimant's degenerative disc disease of the lumbar spine with mild central canal stenosis, when combined with the effects of his asthma and hepatitis C, he would be incapable of work above the sedentary level with no climbing or crawling. In addition, due to the asthma and hepatitis C, he requires work in a relatively clean air work environment and no operation in temperature extremes. Because of the hepatitis C diagnosis, he cannot work in food service or medical assistance areas. Because of the back issues, he requires use of a cane, per doctor's instructions, and the ability to sit and stand every 30 minutes. The claimant also reported radiation of his back pain into the neck, and thus, he requires only occasional flexion, extension, or rotation of the neck.

As for the claimant's mental issues, he underwent a consultative mental status examination on June 30, 2010, with H. Gummadi, M.D. (Exhibit B5F). Mental status examination revealed low self-esteem, some psychomotor retardation, motivation to get better, no tendency to exaggerate symptoms, insight into his problems, spontaneous and logical thoughts that were goal-directed, no loose associations or flight of ideas noted, no auditory or visual hallucinations, no suicidal or homicidal ideations, depressed mood, somewhat tearful affect at times, orientation x 3, and intact general fund of information and calculational skills (Exhibit B5F). The claimant was diagnosed with mood disorder secondary to general medical condition, rule out dysthymia, rule out alcohol abuse, and a GAF of 50, reflective of serious mental symptom (Exhibit B5F/3).

On December 27, 2010, the claimant presented to the ER with depressive symptoms and suicidal ideation (Exhibit B13F/13). He was admitted to BCA of Detroit, where it was noted that the claimant had been noncompliant with psych medications, took a gun and held it to his chin, but when he pulled the trigger, it was not loaded (Exhibit B16F/4). On December 29, 2010, he was assessed a GAF of 20 (Exhibit B16F/23). The claimant was discharged on December 31, 2010, from BCA, with the final diagnosis of depression and prescriptions for Desyrel, Celexa, and Vistaril (Exhibit B15F/6).

The claimant subsequently began treating through Hegira Programs on January 3, 2011 (Exhibit B15F/19). According to Hegira progress notes, dated March 16, 2011, the claimant reported that, after his primary care physician refused to write a script for Desyrel, he went to Oakwood Hospital and told them that he tried to commit suicide and told a lie so that they would give him a prescription for Desyrel (Exhibit B15F/11). Mental status examination on that date revealed unremarkable general appearance, appropriate motor activity to age, anxious/tense mood with congruent affect, appropriate behavior, orientation x 3, goal-directed thoughts, normal memory, poor judgment, and poor impulse control (Exhibit B15F/18). He was assessed a GAF of 44 on March 16, 2011, and 45 on March 26, 2011 (Exhibits B21F/10 and B28F/64).

According to September 14, 2011, progress notes from Hegira, the claimant had intact attention/concentration and euthymic mood (Exhibit B18F/42). On January 18, 2012, he presented as depressed and tearful but without suicidal thoughts (Exhibit B18F/55). As of September

11, 2012, the claimant reported only taking Ativan as prescribed but no other medication (Exhibit B21F/101). On September 28, 2012, he indicated that he was telling Gianina Cristiu, NP about not taking medication because he did not want to hurt his chances of obtaining SSI (Exhibit B21F/107). Mental status examination on October 18, 2012, revealed normal mood and affect, orientation x 3, appropriate judgment, and no impairment of long-term or short-term memory (Exhibit B22F/20).

The claimant reported on December 20, 2012, that he was taking Trazodone and Ativan 0.5 mg but stopped taking Wellbutrin because he was "doing well without it" (Exhibit B21F/26). He noted on December 27, 2012, that staying busy, getting out of the house, and spending time with his son were things that improved his mood and quality of life (Exhibit B21F/119). On January 25, 2013, the claimant noted that he was living with his ex-wife and son, which improved his mood due to socializing with others and going places with them (Exhibit B21F/128). The claimant indicated on April 8, 2013, that he was "feeling extremely depressed recently" and partially attributed this to being denied for SSI (Exhibit B21F/134). As of November 11, 2013, the claimant's GAF was 45 (Exhibit B27F/37).

On July 11, 2013, the claimant underwent another consultative mental status examination, this time with Hugh Bray, Ph.D., where examination revealed adequate contact with reality, poor self-esteem, intact insight and judgment, cooperative and verbally responsive behavior, good eye contact, logical and organized stream of mental activity, clear and

understandable speech, age-appropriate content of communication, no visual or auditory hallucinations, pleasant emotional reaction but tearing up and reserved, depressed mood, and average concentration, attention, persistence, and effort (Exhibit B24F/2-4). The claimant was diagnosed with major depressive disorder and a GAF of 55, indicative of moderate mental symptomatology (Exhibit B24F/4).

Records indicate that the claimant continued treating at Hegira through June 2014 (Exhibits B27F and B28F). On that date, he was described as having a euthymic mood, intact attention and concentration, and stable sleep, weight, and appetite (Exhibit B27F/4-5).

As for opinion evidence, Dr. Gummadi prepared the following mental Medical Source Statement at the end of his examination:

> Based on today's exam, the claimant is able to understand, retain and follow instructions and restricted to performing simple routine repetitive tasks. Due to his depression with physical problems, he is restricted to work that involves brief and superficial interactions with coworkers, supervisors and the public.

(Exhibit B5F/3). Dr. Bray also prepared the following mental Medical Source Statement at the conclusion of his examination:

1. The claimant's mental ability to relate to others, including fellow workers and supervisors is moderately impaired. In interacting with the examiner today the

claimant was able to form a rapport with the examiner.

2. The claimant's mental ability to understand, remember and carry out tasks appears to be moderately impaired. In interacting with the examiner today the claimant was able to perform simple repetitive tasks. It is likely the claimant could handle more complex tasks. Difficulty n[sic] performing multiple step tasks is likely to be moderate.

3. The claimant's mental ability to maintain attention, concentration, persistence, pace and effort is moderately impaired.

4. The claimant's mental ability to withstand stress and pressure associated with day-to-day work activities is moderately impaired.

(Exhibit B24F/4). The undersigned gives great weight to the opinion of Drs. Gummadi and Bray, as they are consistent with the evidence in the record. Although the claimant has noted issues with wanting to isolate himself, as described throughout the Hegira records, he reported shopping in stores, living with his mother, and that getting out of the house and spending time with his son were things that improved his mood and quality of life (Exhibits B14E and B21F/119). Thus, he is capable of handling work with only brief and superficial interaction with the public, coworkers, and supervisors. Furthermore, the claimant indicated that he prepared simple meals, drove, watched television, did laundry,

shopped in stores, and read, which would support a finding that he is capable of simple, routine tasks (Exhibit B14E; testimony).

A Psychiatric/Psychological Examination Report was prepared by Gianina Cristiu, NP from Hegira Programs on February 28, 2012, noting that the claimant had major depressive disorder and a GAF of 40 (Exhibit B19F/3). Limited weight is given to this very low GAF score, as it conflicts internally with the less-than-serious clinical findings on mental status examination that note cooperative behavior, goal-oriented thought process, orientation x 4, adequate concentration, good memory, and impaired judgment and impulse control (Exhibit B19F/3). In any event, a nurse practitioner is not an acceptable medical source, and thus, cannot issue a medical opinion (*See* 20 CFR 404.1513(a), 404.1527(a)(2), 416.913(a), and 416.927(a)(2)).

Medical Examination Reports were prepared by Howard Wright, D.O., on April 25, 2013, and October 7, 2013, indicating that the claimant could occasionally lift/carry less than 10 pounds of weight, stand/walk for less than 2 of 8 hours, sit for less than 6 of 8 hours, never push/pull or finely manipulate, and was limited in comprehension, memory, sustained concentration, following simple directions, reading, writing, and social interaction (Exhibits B22F/41-43 and B34F). Dr. Wright then prepared a Medical Source Statement on July 10, 2015, indicating that he was incapable of even "low stress" jobs, could not walk even one city block without pain, could sit for less than 2 of 8 hours total, could stand/walk for less than 2 of 8 hour [sic] total, could occasionally life [sic] or carry less than 10 pounds of

weight, had pain and other symptoms that would "constantly" interfere with his attention and concentration, and would miss more than four days of work per month (Exhibit B31F). The undersigned gives minimal weight to Dr. Wright's opinions for numerous reasons. First, despite preparing the most recent disabling opinion in July 2015, the doctor admitted to not having seen the claimant since April 2013, or over two years prior (Exhibit B31F/1). Moreover, the objective medical evidence in the record does not support the significant limitations proposed by Dr. Wright. Most notably, the numerous MRI studies showed no more than mild-to-moderate degenerative findings, which is inconsistent with Dr. Wright's suggestions.

At the conclusion of the consultative examination, Dr. Salomon opined that the claimant was "not very functional" (Exhibit B23F/3). The undersigned gives little weight to Dr. Salomon's opinion, as he does not give specific functional limitations but merely makes a blanket statement. Moreover, Dr. Salomon only examined the claimant on one occasion, and thus, has no treating relationship with the claimant. Although Dr. Salomon found positive straight leg raising upon examination, the diagnostic findings on the various MRIs do not support the disabling statement from the examiner.

At the second hearing, Dr. Barnes opined that the claimant could occasionally lift 10 pounds of weight and frequently lift 5 pounds of weight; sit for 8 hours of the day, a couple hours at a time; stand or walk for 2-4 hours, in increments of about a half hour at a time before having to sit down for about 10 minutes; and could squat to pick

up 10 pounds but not bend at the waist to do so. The undersigned also gives great weight to this portion of Dr. Barnes' opinion, as it is supported by the evidence in the record. The various MRI studies and multiple back injections evidence the fact that the claimant has abnormalities in the back that functionally limit the claimant to the point where he is incapable of work above the sedentary level. However, the mild nature of the abnormalities, as described in numerous radiological findings, suggests that he is not further limited to the point where he could not do the above on a consistent basis.

The claimant was assessed a wide range of GAF scores between 20 and 55 throughout the medical records. On one end, A GAF of 20 indicates some danger of hurting self or others. Conversely, a GAF of 55 is reflective of only moderate symptoms. The undersigned gives greater weight to the moderate GAF score, as it is supported by the evidence in the record. Namely, the various mental status examination throughout the record evidence clinical abnormalities but nothing that would support a serous [sic] finding (Exhibits B5F, B15F, B22F, and B24F). For these reasons, little weight is given to the more serious GAF scores (i.e. 45 and below).

State agency psychological consultant, Edward Czarnecki, Ph.D., determined on August 12, 2010, that the claimant retained the mental capacity to sustain an independent routine of simple tasks (Exhibits B6F and B7F). Similarly, on July 23, 2013, Dr. Czarnecki determined that the claimant could perform simple, rote, repetitive unskilled work (Exhibit B9A). The

undersigned gives great weight to the opinions of Dr. Czarnecki, as they are supported by the opinions of consultative examiners Drs. Gummadi and Bray, who both determined that the claimant could perform simple routine work (Exhibits B5F and B24F).

The undersigned has also considered a State of Michigan Department of Human Services decision authored by a State ALJ on August 13, 2012, finding the claimant was disabled for purposes of the Medical Assistance and State Disability Assistance programs (Exhibit B19F). Although the undersigned has considered this evidence pursuant to 20 CFR 404.1512 and 416.912 and SSR 06-3p, the undersigned notes that the issue of disability is ultimately reserved to the Commissioner (20 CFR 404.1527(e)(2) and 419.927(e)(1) and SSR 96-5p). Additionally, the regulations specifically provide that a determination made by another agency, although cannot be ignored, is not binding on the administrative law judge (20 CFR 404.1504 and 416.904).

The undersigned also considered the Third Party Function Reports, prepared by the claimant's mother, Rita Biestek, on April 18, 2010, and April 24, 2013, which are mostly consistent with the claimant's Function Report (Exhibits B5E, B12E, and B14E). As the claimant's statements concerning the intensity, persistence, and limiting effects of his symptoms are not entirely credible, as indicated elsewhere in the decision, little weight is attributed to these Third Party Function Reports. Nevertheless, Ms. Biestek is not an acceptable medical source, and thus, cannot issue a medical opinion (*See* 20 CFR 404.1513(a), 404.1527(a)(2), 416.913(a), and 416.927(a)(2)).

In assessing the credibility of the claimant, the undersigned notes that the treatment for his various impairments were described as being relatively effective in controlling his symptoms. For instance, in January 2011, he reported that "Demerol help[ed] his pain" (Exhibit B13F/6). The claimant received bilateral medial branch blocks on April 6, 2011, and indicated that his pain level was 1/10 in severity (Exhibits B11F/27 and B20F/16). On January 20, 2012, he reported that physical therapy was helpful and that the injections provided at the prior office visit were "extremely beneficial" (Exhibit B17F/2). On May 22, 2014, the claimant reported that the back injections helped "some" (Exhibit B29F/6). The relative effectiveness of the treatment diminishes the credibility of the completely disabling allegations and supports a finding that he has been capable of performing work within the restricted range of sedentary work identified.

At one point or another in the record (either in forms completed in connection with the application and appeal, in medical reports or records, or in the claimant's testimony), the claimant reported the following daily activities: reading the newspaper, preparing simple meals, visiting his son at least twice a week, driving, taking care of his basic needs on a consistent basis, doing some laundry, shopping, cashing checks, providing childcare, watching television, running errands, playing video games, and making appointments (Exhibits B14E, B5F, and B24F/2; testimony). These activities require functioning within the limited range of sedentary work identified.

The undersigned also notes that the claimant has been noncompliant with prescribed treatment. Most notably, records from Hegira reflect numerous no shows and cancelations by the claimant (Exhibits B18F, B21F, B27F, and B28F). Moreover, as of June 18, 2014, he reported only using pain medications "once in a while as needed" (Exhibit B29F/4). The claimant's noncompliance with his treatment suggests that the symptoms may not be as limiting as the claimant has alleged in connection with this application and reflects poorly on the credibility of his allegations.

In sum, the above residual functional capacity assessment is supported by the medical records in the file, the relative effectiveness of the prescribed treatment, his activities of daily living, the noncompliance with mental health treatment, and the opinion of medical expert Dr. Barnes.

6. Since October 28, 2009, the claimant has been unable to perform any past relevant work (20 CFR 404.1565 and 416.965).

Pursuant to *Dennard v Secretary of Health and Human Services*, 907 F.2d 598 (6th Cir. 1990) and Acquiescence Ruling 98-3(6), the undersigned must adopt a finding of the demands of a claimant's past relevant work made in the final decision by the ALJ or Appeals Council on the prior disability claim absent new and material evidence relating to such a finding or a change in the law, regulations, or rulings affecting the finding. The ALJ in the 2009 decision found that the claimant had past relevant work as a scaffold builder (semi-skilled/heavy) (Exhibit B1A/9). The vocational expert in the instant hearing had an opportunity to hear claimant's

description of his duties and how much weight was involved—18-24 pounds, thus allowing for a more accurate classification of the prior relevant work as carpenter (scaffold builder),(semiskilled/medium). This testimony was not a part of the oral record in the earlier hearing. This is new and material evidence in the record making the earlier finding none binding. Thus, the job as classified in the hearing at issue constitutes the claimant's past relevant work for purposes of this decision. As the job required the medium exertional level, the claimant is unable to perform past relevant work.

7. Prior to the established disability onset date, the claimant was a younger individual age 45-49. On May [redacted] 2013, the claimant's age category changed to an individual closely approaching advanced age (20 CFR 404.1563 and 416.963).

8. The claimant has at least a high school education and is able to communicate in English (20 CFR 404.1564 and 416.964).

9. Prior to May [redacted] 2013, transferability of job skills is not material to the determination of disability because using the Medical-Vocational Rules as a framework supports a finding that the claimant is "not disabled" whether or not the claimant has transferable job skills. Beginning on May [redacted] 2013, the claimant has not been able to transfer job skills to other occupations (See SSR 82-41 and 20 CFR Part 404, Subpart P, Appendix 2).

10. Prior to May [redacted] 2013, the date the claimant's age category changed, considering the claimant's age,

education, work experience, and residual functional capacity, there were jobs that existed in significant numbers in the national economy that the claimant could have performed (20 CFR 404.1569, 404.1569a, 416.969, and 416.969a).

In determining whether a successful adjustment to other work can be made, the undersigned must consider the claimant's residual functional capacity, age, education, and work experience in conjunction with the Medical-Vocational Guidelines, 20 CFR Part 404, Subpart P, Appendix 2. If the claimant can perform all or substantially all of the exertional demands at a given level of exertion, the medical-vocational rules direct a conclusion of either "disabled" or "not disabled" depending upon the claimant's specific vocational profile (SSR 83-11). When the claimant cannot perform substantially all of the exertional demands of work at a given level of exertion and/or has nonexertional limitations, the medical-vocational rules are used as a framework for decision-making unless there is a rule that directs a conclusion of "disabled" without considering the additional exertional and/or nonexertional limitations (SSRs 83-12 and 83-14). If the claimant has solely nonexertional limitations, section 204.00 in the Medical-Vocational Guidelines provides a framework for decision-making (SSR 85-15).

Prior to May [redacted] 2013, if the claimant had the residual functional capacity to perform the full range of sedentary work, a finding of "not disabled" would be directed by Medical-Vocational Rule 201.21. However, the claimant's ability to perform all or substantially all of the requirements of this level of work was impeded by

additional limitations. To determine the extent to which these limitations eroded the unskilled sedentary occupational base, the Administrative Law Judge asked the vocational expert whether jobs exist in the national economy for an individual with the claimant's age, education, work experience, and residual functional capacity. The vocational expert testified that given all of these factors the individual would have been able to perform the requirements of representative ***sedentary unskilled*** occupations such as a bench assembler (representative DOT No. 713.687-018), with 240,000 jobs nationally; and sorter (representative DOT No. 521.687-086), with 120,000 jobs nationally.

Pursuant to SSR 00-4p, the vocational expert stated that her testimony is consistent with information contained in the Dictionary of Occupational Titles including its companion publication, the Selected Characteristics of Occupations defined in the Revised Dictionary of Occupational Titles (SCO). The vocational expert further stated that neither publication addresses a sit/stand option, time off task, or use of a cane but the testimony is based on her knowledge and experience of the job market in Southeastern Michigan. When the testimony of a vocational expert differs from the DOT, the Administrative Law Judge may rely upon the vocational expert (Conn v. Secretary of Health and Human Services, 51 F.3d 607, 610 (6th Cir. 1995)). The undersigned finds that this is a reasonable explanation for the expansion on the information in the DOT and SCO. The vocational expert's testimony is given great weight.

Based on the testimony of the vocational expert, the undersigned finds that, prior to the established onset date of disability, considering the claimant's age, education, work experience, and residual functional capacity, the claimant was capable of making a successful adjustment to other work that existed in significant numbers in the national economy. Prior to May [redacted] 2013, a finding of "not disabled" is therefore appropriate under the framework of the above-cited rule in the Medical-Vocational Guidelines.

In making this finding, the undersigned considered the vocational opinion of Lee Knutson from September 23, 2015 (Exhibit B37E). The undersigned gives little weight to this opinion, as the cited jobs are not relevant to this decision (Exhibit B37E/2). Furthermore, the "light exertional" work and need to "stop work and stretch" are not part of the residual functional capacity, and thus, not pertinent to the above jobs and the respective job numbers.

11. Beginning on May [redacted] 2013, the date the claimant's age category changed, considering the claimant's age, education, work experience, and residual functional capacity, there are no jobs that exist in significant numbers in the national economy that the claimant could perform (20 CFR 404.1560(c), 404.1566, 416.960(c), and 416.966).

Beginning on the date the claimant's age category changed, considering the claimant's age, education, and work experience, a finding of "disabled" is reached by direct application of Medical-Vocational Rule 201.14.

12. The claimant was not disabled prior to May [redacted] 2013, but became disabled on that date and has continued to be disabled through the date of this decision (20 CFR 404.1520(g) and 416.920(g)).

13. The claimant was not under a disability within the meaning of the Social Security Act at any time through December 31, 2010, the date last insured (20 CFR 404.315(a) and 404.320(b)).

DECISION

Based on the application for a period of disability and disability insurance benefits filed on March 25, 2010, the claimant was not disabled under sections 216(i) and 223(d), respectively, of the Social Security Act through December 31, 2010, the date last insured.

Based on the application for supplemental security income filed on March 25, 2010, the claimant has been disabled under section 1614(a)(3)(A) of the Social Security Act beginning on May [redacted] 2013.

The component of the Social Security Administration responsible for authorizing supplemental security income will advise the claimant regarding the nondisability requirements for these payments, and if eligible, the amount and the months for which payment will be made.

/s/
Ethel Revels
Administrative Law Judge

November 24, 2015
Date

Appendix E

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION AND REVIEW

In the case of Michael John Biestek (Claimant) (Wage Earner) (Leave blank in Title XVI Cases or if name is same as above)	**TRANSCRIPT** Claim for Period of Disability Disability Insurance Benefits Supplemental Security Income [REDACTED] (Social Security Number)

Hearing Held

at

Detroit, Michigan

(Room No., Building, Street Address, City, State)

On

July 21, 2015

(Month, Day, Year)

By

Ethel Revels

(Administrative Law Judge)

APPEARANCES:

Michael John Biestek, the Claimant
Frederick J. Daley, Jr., Attorney for Claimant
Erin M. O'Callaghan, MA, CRC,
Vocational Expert

* * * *

[58] Are there a sample of jobs that you can identify at that light exertional level with those limitations?

A There would be jobs for such a person. There'd be light, unskilled work such as a bench assembler. There would be 6,000 jobs in Southeast Michigan, 450,000 in the national economy, a representative DOT code of 706.684-022. An inspector, with 10,000 jobs – I'm sorry, Your Honor, with 8,000 jobs in Southeast Michigan, 450,000 in the national economy, a representative DOT code of 762.687-014.

There would be jobs such as a lobby attendant or a badge checker. There would be 2,000 jobs in Southeast Michigan, 100,000 in the national economy, a representative DOT code of 239.567-010.

[59] Q And for purposes of a second hypothetical – I'm sorry, with those limitations, are you – if I were to find that such a person could perform work at the sedentary level, are there a sampling of jobs that you could identify at that exertion level for me with those limitations?

A Yes, Your Honor, there would be jobs such as a bench assembler with 3,000 jobs in Southeast Michigan, 240,000 in the national economy, a representative DOT code of 713.687-018; jobs as a sorter with 1,500 jobs in Southeast Michigan, 120,000 in the national economy, a representative DOT code of 521.687-086; a surveillance system monitor with 1,000 jobs in Southeast Michigan, 80,000 in the national economy, a representative DOT code of 379.367-010 .

* * * *

[60] Q Are there a sampling of jobs under the sedentary exertional level if I were to find that such a person could perform work at the sedentary level that you would be able to identify?

A Yes, Your Honor, the jobs I previously testified to would still exist. There would be a reduction in the sorter and bench assembler jobs by about 20 to 30 percent.

[61] Q You have identified jobs in response to my hypotheticals. Are the requirements and classification of those jobs consistent with that of the DOT and its companion publication, the SCO?

A My testimony is consistent. I would indicate that issues relating to a sit/stand option or time off task are not addressed by the DOT and that testimony is based on my professional experience.

Q Would such a person be able – does the DOT address the use of a cane?

A It does not, Your Honor. That would also be based on my professional experience.

* * * *

[67] VE: It would be – you need to be on task a minimum of 80 percent of the workday.

BY ATTORNEY:

Q And where do you get that from?

A My professional experience.

Q That your professional experience, did you do a study?

A Talking with employers, doing job analysis on the job for these types of jobs.

Q Okay. Can you provide those job analysis?

A They would be part of people's private confidential files.

ATTY: I mean you can black that part out, but –

ALJ: I'm not requiring that, so you can use that as an appealable if she says that it's a part of her overall training over the years, as well as her confidential file of individual people.

* * * *

[71] Q Any of the jobs that you – the jobs that you gave from the DOT, can you tell me when was the last time those jobs were surveyed for the DOT?

A I'd have to look them each up individually.

Q I mean, my understanding is some are 1971 and some are 1991. Does that –

A That's correct.

Q – sound right?

A Yes, 1991 would have been the last time.

Q And is it the same with the job numbers or where are you getting those?

A No, the job numbers are updated –

Q Where are you –

A – annually.

Q And where are you getting those from?

A I'm getting them from the Bureau of Labor Statistics as well as my own individual labor market surveys.

Q Okay. Can you provide your own?

[72] A It would, again, be the same answer, as that they're part of client files.

ATTY: Yes, okay. I mean, you can take the clients' names out. It's the substance I'm looking for.

ALJ: You asked her and she's responded and I said that my ruling is that I would not require that she provide that and I'll make a note that you object to that.

* * * *

Appendix F

QUESTIONING OF THE VOCATIONAL EXPERT EXCERPT FROM HEARING AT ISSUE IN MCKINNIE V. BARNHART, 368 F.3d 907 (7th Cir. 2004)

* * * *

[59] Q And the numbers that you gave for each, can you show how you arrived at that figure?

A. That's arrived through regular market studies, Department of Labor Statistics and Census Bureaus. You might want to refer to County Business Patterns in Chicago and northwest Indiana.

Q Okay, now tell us which ones you refer to?

A I refer to them in combination, to include my personal labor market surveys in extrapolating the numbers.

Q Okay, could you make that person survey a part of the record? Do you have it with you to make a part of the record?

A No.

Q You don't have it with you but you can make it part of the record?

A Yes, if I'm asked to do so –

ALJ Is that a very extensive job? Counsel willing to pay for that?

ATTY: Well it should have already been done. The burden is on the government.

[60] ALJ: No I didn't. I didn't say that she, she didn't say that she had made a written reprot [sic] of this already. She didn't say that. She said she used this information in coming to her answers.

ATTY: Well if she used the information to come to her answers, she has to prove it. She has to have the data.

* * * *

No. 17-1184

In the Supreme Court of the United States

MICHAEL J. BIESTEK, PETITIONER

v.

NANCY A. BERRYHILL, ACTING COMMISSIONER, SOCIAL SECURITY ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the administrative law judge in this Social Security disability benefits case erred in crediting the vocational expert's opinion, which was based upon the expert's professional experience, without requiring disclosure of the expert's confidential files.

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In the Supreme Court of the United States

No. 17-1184

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NANCY A. BERRYHILL, ACTING COMMISSIONER, SOCIAL SECURITY ADMINISTRATION[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 880 F.3d 778. The opinion of the district court adopting the magistrate judge's report and recommendation (Pet. App. 25a-34a) is not published in the Federal Supplement but is available at 2017 WL 1173775. The magistrate judge's report and recommendation (Pet. App. 35a-74a) is not published in the Federal Supplement but is available at 2017 WL 1214456.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24a) was entered on December 27, 2017. The petition for a writ of certiorari was filed on February 21, 2018. The

[1] Respondent's title is corrected to reflect her current position in accordance with Supreme Court Rule 35.3.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Social Security Act (Act), 42 U.S.C. 301 *et seq.*, authorizes the payment of Social Security Disability Insurance (SSDI) and supplemental security income (SSI) benefits to certain individuals with disabilities. 42 U.S.C. 423(a)(1)(E) (SSDI); 42 U.S.C. 1381a (SSI). As relevant here, the Act defines "disability" to include the inability to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" that is expected to result in death or to last at least 12 months. 42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A). To qualify as "disab[led]," an individual's physical or mental impairment must be of "such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B).

The Social Security Administration (SSA) adjudicates disability claims through a multi-step administrative review process. See 20 C.F.R. 404.900 (SSDI); 20 C.F.R. 416.1400 (SSI). A claimant for benefits first receives an initial determination, and if dissatisfied, the claimant may request reconsideration. 20 C.F.R. 404.900(a)(1) and (2), 416.1400(a)(1) and (2). If dissatisfied with the reconsideration determination, the claimant may then request a hearing before an administrative law judge (ALJ). 20 C.F.R. 404.900(a)(3), 416.1400(a)(3). And if dissatisfied with the ALJ's decision, the claimant may request review by the Appeals Council in SSA. 20 C.F.R. 404.900(a)(4), 416.1400(a)(4). At each of those levels, "the agency operates essentially, and is intended so to do, as

an adjudicator and not as an advocate or adversary." *Richardson* v. *Perales*, 402 U.S. 389, 403 (1971).

Recognizing the non-adversarial nature of this scheme, the Act provides that "[e]vidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure." 42 U.S.C. 405(b)(1). Thus, "strict rules of evidence * * * are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent." *Richardson*, 402 U.S. at 400. "[T]he conduct of the hearing rests generally in the examiner's discretion," subject to "hearing procedures" established by agency regulation. *Ibid.* And the agency's findings of fact, "if supported by substantial evidence," are "conclusive" for purposes of judicial review. 42 U.S.C. 405(g).

b. To determine whether a claimant is entitled to disability benefits, the SSA employs a five-step sequential evaluation process. 20 C.F.R. 404.1520(a)(4) (SSDI); 20 C.F.R. 416.920(a)(4) (SSI); see *Barnhart* v. *Thomas*, 540 U.S. 20, 24-25 (2003) (describing this process). The agency must determine, first, whether the claimant is performing substantial gainful activity (in which case he is not disabled); second, whether the claimant's impairment is "severe"; third, whether that impairment meets or medically equals an impairment listed in SSA regulations; fourth, if the impairment does not meet or medically equal the listings, whether the claimant's residual functional capacity allows him to perform his past work; and fifth, whether the claimant is unable to perform other work. 20 C.F.R. 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). The claimant bears the burden of providing evidence at each of the first four steps, while the agency bears that burden at step five.

At step five, the agency must determine whether other work exists "in significant numbers in the national economy" that the claimant can perform, given his residual functional capacity, age, education, and work experience. 20 C.F.R. 404.1560(c)(1), 416.960(c)(1). SSA has adopted medical-vocational guidelines under which, if a claimant's characteristics correspond to the criteria of a rule, the guidelines direct a conclusion regarding whether work exists that a claimant can perform. 20 C.F.R. Pt. 404, Subpt. P, App. 2; see *Heckler* v. *Campbell*, 461 U.S. 458 (1983); 20 C.F.R. 404.1569, 416.969. In other circumstances, the ALJ may rely upon the testimony of a vocational expert. See 20 C.F.R. 404.1560(c)(2), 404.1566(e), 416.960(c)(2), 416.966(e). The ALJ typically poses hypothetical questions asking the vocational expert to identify the types and numbers of jobs that could be performed by a person of the claimant's age, education, and work experience, with specified limitations reflecting the particular claimant's functional capacity. Cf. Pet. App. 41a.

In answering those questions, vocational experts may rely on various sources of information. To identify the types of jobs a claimant could perform, vocational experts often rely on a U.S. Department of Labor publication, the *Dictionary of Occupational Titles* (4th ed. rev. 1991) (*Dictionary*). The *Dictionary* "gives a job type a specific code—for example, '295.467-026 Automobile Rental Clerk'—and establishes, among other things, the minimum skill level and physical exertion capacity required to perform that job." *Brault* v. *Social Sec. Admin.*, 683 F.3d 443, 446 (2d Cir. 2012) (per curiam). Although the *Dictionary* "defines jobs," it "does not report how many such jobs are available in the economy." *Ibid.* (emphasis omitted). To determine the number of posi-

tions that are available for a particular job type, the vocational expert may rely on her professional knowledge and experience and various other sources of information, including federal or state government publications.

2. Petitioner worked as a carpenter and construction laborer until 2005. Pet. App. 3a. In 2010, petitioner applied for SSDI and SSI benefits with an alleged disability onset date in October 2009. *Ibid.* Petitioner alleged that his disabilities included degenerative disc disease, Hepatitis C, asthma, and/or depression. *Id.* at 3a, 37a.

After extensive administrative proceedings (see Pet. App. 3a-4a, 75a-78a), the ALJ concluded that petitioner was "not disabled" prior to May 2013. *Id.* at 113a; see *id.* at 78a-79a, 109a-112a. The ALJ determined that petitioner's impairments were severe, but that they did not meet or medically equal any of the listings. *Id.* at 83a-89a. And upon considering petitioner's age, education, work experience, and residual functional capacity, the ALJ determined that, prior to May 2013 (when petitioner turned 50 years old), petitioner was capable of performing work that existed in significant numbers in the national economy. *Id.* at 109a-112a.[2]

As relevant here, in performing the step-five inquiry, the ALJ relied upon "the testimony of [a] vocational expert." Pet. App. 112a; see *id.* at 111a-112a. The vocational expert testified that a hypothetical person with petitioner's characteristics could perform sedentary work such as bench assembler, for which the expert estimated there were 240,000 jobs nationally, and sorter, for which there were 120,000 jobs nationally. *Id.* at

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[2] Once petitioner reached age 50, the agency's medical-vocational guidelines directed a finding that he became "disabled." Pet. App. 113a; see *id.* at 109a, 112a-113a.

111a, 116a.[3] The vocational expert based her testimony upon the *Dictionary*; data from the Bureau of Labor Statistics; and her 11 years of professional experience as a vocational rehabilitation consultant, which included interviewing employers, performing on-the-job analyses, and conducting labor market surveys. *Id.* at 20a, 28a, 70a, 117a-119a.

During cross-examination, petitioner's counsel asked the vocational expert to produce data supporting her professional opinions. Pet. App. 28a, 118a-119a. The vocational expert explained that her opinions were based in part upon "job analys[e]s" and "labor market surveys" that were performed for individual clients and which were "part of [their] private confidential files." *Id.* at 118a-119a. The ALJ then indicated that the vocational expert would be permitted to testify based upon her professional experience without producing "her confidential file[s]" pertaining to "individual people." *Id.* at 118a.

The Appeals Council denied review. Pet. App. 3a.

3. Petitioner brought suit challenging the ALJ's decision on various grounds, and a magistrate judge recommended upholding the ALJ's decision. Pet. App. 35a-74a. As relevant here (see *id.* at 69a-73a), the magistrate judge explained that an ALJ is entitled to rely upon the testimony of a vocational expert "even where that testimony is not based on the [*Dictionary*], but on the [vocational expert's] professional experience." *Id.* at 71a; see *ibid.* (noting that the "credibility of the [vocational expert's] testimony was fully probed at the hearing"). The

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[3] The vocational expert opined that if certain additional functional limitations were imposed, the hypothetical person could still perform those jobs, but the number of positions would be reduced "by about 20 to 30 percent." Pet. App. 117a.

district court adopted the magistrate judge's recommendation in full. *Id.* at 25a-34a.

4. The court of appeals affirmed. Pet. App. 1a-23a. As relevant here, the court concluded that the ALJ did not err in permitting the vocational expert to base her testimony upon both the *Dictionary* and her "'professional experience[]' gained from talking with employers and conducting job analyses." *Id.* at 20a. Noting petitioner's reliance on several Seventh Circuit decisions, see *id.* at 20a-21a, the court of appeals agreed that vocational expert testimony cannot be considered substantial evidence if it is "conjured out of whole cloth," *id.* at 22a (quoting *Donahue* v. *Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002)). But the court reasoned that the task of "guarding against baseless testimony" does not require "incorporating the stringent evidentiary requirements embodied in the Federal Rules of Evidence." *Ibid.* The court therefore declined to endorse an approach that would "incorporat[e] the essence * * * of Federal Rule of Evidence 702" into the evaluation of vocational expert testimony. *Id.* at 20a. The court also noted that there was "little clarity" as to how the Seventh Circuit would apply its seemingly more "rigorous" approach. *Id.* at 20a, 22a.

ARGUMENT

Petitioner contends (Pet. 11-24) that the court of appeals erred in declining to require the ALJ, before relying upon vocational expert testimony, to require disclosure of the expert's confidential files. The court of appeals' decision is correct and does not implicate any conflict warranting this Court's review. Although the court below understood the Seventh Circuit to have adopted a more demanding approach for evaluating vocational expert testimony, the extent to which any genuine conflict

exists among the circuits remains unclear, and petitioner has not shown that the Seventh Circuit would reach a different result on the facts of this case. Moreover, in light of recent updates to SSA guidance, any disagreement may be of little prospective importance. The petition for a writ of certiorari should therefore be denied.

1. The court of appeals correctly concluded that the ALJ was permitted to credit the vocational expert's testimony, which was based upon her 11 years of professional experience as a vocational rehabilitation consultant, without requiring the expert to disclose her "private confidential files" relating to that experience. Pet. App. 118a; see *id.* at 20a-22a.

a. The Social Security Act provides that "[e]vidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure." 42 U.S.C. 405(b)(1). "[T]he conduct of the hearing rests generally in the examiner's discretion," in accordance with "hearing procedures" established by agency regulation. *Richardson* v. *Perales*, 402 U.S. 389, 400 (1971). An ALJ therefore need not determine that a vocational expert has satisfied the requirements for expert testimony under Federal Rule of Evidence 702, or any other evidentiary rules applicable in court, before her testimony may be admitted and relied upon at a disability benefits hearing. See *Richardson*, 402 U.S. at 400 ("[S]trict rules of evidence * * * are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent.").

At the same time, SSA has recognized that ALJs should rely upon expert testimony only if that testimony is considered to be reliable. To that end, the agency's regulations allow a claimant to question a vocational ex-

pert (and other witnesses) regarding the basis for the expert's testimony and to present arguments concerning the reliability of that testimony. See 20 C.F.R. 404.929, 404.949-404.950, 416.1429, 416.1449-416.1450. Its regulations also allow a claimant to tender conflicting evidence, see 20 C.F.R. 404.935, 404.950, 416.1435, 416.1450, and courts have concluded that significant inconsistencies in such evidence should be addressed by the ALJ, see, *e.g.*, *Buck* v. *Berryhill*, 869 F.3d 1040, 1052 (9th Cir. 2017) (remanding to the agency where "the vast discrepancy between the [vocational expert's] job numbers and those tendered by [the claimant], presumably from the same source, is simply too striking to be ignored").

In addition, SSA has provided guidance specifically on the topic of vocational expert testimony. In a December 2000 Social Security ruling, SSA instructed that where there is an apparent conflict between a vocational expert's testimony and the *Dictionary*, the ALJ should elicit a reasonable explanation for the conflict before relying on the expert's testimony. SSR 00-4p, 65 Fed. Reg. 75,759, 75,760 (Dec. 4, 2000). And as explained below, see pp. 17-18, *infra*, SSA has recently provided updated guidance concerning the identification of sources that vocational experts rely upon in presenting job numbers. SSA has not, however, required or suggested that an ALJ should not permit a vocational expert to rely upon her professional experience or that an expert must disclose confidential client files before she may do so.

b. The court of appeals correctly applied these principles in rejecting petitioner's argument that the ALJ should have "require[d] the vocational expert to produce data or other documentation to support her opinions." Pet. App. 20a. As authority for that purported requirement, petitioner cited a pair of decisions that appeared

to "incorporat[e] the essence, if not the explicit requirements, of Federal Rule of Evidence 702." *Ibid.* (citing *Donahue* v. *Barnhart*, 279 F.3d 441 (7th Cir. 2002) and *McKinnie* v. *Barnhart*, 368 F.3d 907 (7th Cir. 2004) (per curiam)). As the court explained, however, "Congress specifically exempted Social Security disability proceedings from the strictures of the Federal Rules of Evidence," thereby "allowing ALJs to consider a broader range of potentially relevant information than would be admissible in an ordinary court of law." *Id.* at 21a (citing 42 U.S.C. 405(b)(1)). The court thus properly declined to adopt a judicial "rule" that would categorically preclude an ALJ's consideration of vocational expert testimony based upon professional experience unless the testimony is independently corroborated by data. *Id.* at 22a.

At the same time, the court of appeals recognized that an ALJ generally should "guard[] against baseless testimony." Pet. App. 22a. Indeed, the court agreed with the Seventh Circuit that "vocational expert testimony that is 'conjured out of whole cloth' cannot be considered substantial evidence." *Ibid.* (quoting *Donahue*, 279 F.3d at 446). The court of appeals here observed, however, that petitioner had had the opportunity to raise objections to the reliability of the vocational expert's testimony, and the court correctly explained that "[u]ltimately, responsibility for weighing the credibility of witnesses belongs to the ALJ," *ibid.* Reviewing the record here, the court concluded that the ALJ "in this case" had "acceptably fulfilled that obligation." *Ibid.* That factbound determination does not warrant this Court's review. See Sup. Ct. R. 10.

c. Petitioner does not identify the basis for his assertion of error in the court of appeals' decision or in the ALJ's conduct of the hearing in this case. Petitioner principally asserts that "an ALJ's decision must be supported

by 'substantial evidence,'" Pet. 21 (citation omitted), and contends that a vocational expert's professional knowledge categorically cannot constitute such evidence unless detailed "supporting data" are provided upon request, Pet. 22. But petitioner identifies no statute, regulation, or decision of this Court that compels adoption of such a rigid rule. On the contrary, the "'substantial evidence' standard" is "extremely flexible" and "gives federal courts the freedom to take a case-specific, comprehensive view of the administrative proceedings, weighing all the evidence to determine whether it was 'substantial.'" *Brault* v. *Social Sec. Admin.*, 683 F.3d 443, 449 (2d Cir. 2012) (per curiam).

Lacking statutory or regulatory support for his proposed mandatory rule, petitioner seeks (Pet. 22) to analogize to "other area[s] of the law" in which, petitioner maintains, an expert must tender "underlying data" for her conclusions. As already explained (see pp. 2-3, 8-9, *supra*), however, the determination of Social Security disability benefits differs from other adjudicative schemes; the Social Security Act and its implementing regulations provide for non-adversarial, streamlined hearing procedures in which "rules of evidence applicable to court procedure" do not apply. 42 U.S.C. 405(b)(1). Social Security disability cases thus permissibly stand "separate and apart" from other kinds of adjudication as a matter of express statutory and regulatory design. Pet. 22.

In any event, petitioner's argument also fails on its own terms. Even in adjudications that (unlike Social Security disability proceedings) are governed by the Federal Rules of Evidence, an expert's professional experience may afford a valid standalone basis for his testimony. The advisory committee's note to Rule 702 states that "[n]othing in this amendment is intended to suggest

that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide sufficient foundation for expert testimony." Fed. R. Evid. 702 advisory committee's note (2000 Amendment); cf. *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 156 (1999) ("[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience."). The Federal Rules also specify that an expert may base an opinion upon facts or data on which experts in the field would reasonably rely even if the facts and data themselves are not admissible in the proceeding. Fed. R. Evid. 703. It follows *a fortiori* that professional experience may constitute a valid basis for a vocational expert's testimony in a Social Security disability benefits hearing, where formal evidentiary rules do not apply at all.

d. Although the application of law to the facts of this case would not independently warrant review, cf. Sup. Ct. R. 10, petitioner also fails to offer any case-specific argument as to why the ALJ's step-five determination was not supported by substantial evidence on the administrative record in this case. The ALJ confirmed that the vocational expert's testimony about the types of jobs available to petitioner was consistent with the *Dictionary*, see Pet. App. 117a, and petitioner does not argue otherwise. And although it is true that the *Dictionary* does not address all of petitioner's limitations (Pet. 9-10), petitioner apparently does not dispute that the vocational expert could supplement the *Dictionary* by testifying about the types of jobs petitioner could perform based upon her professional experience. Pet. App. 117a-119a; see *id.* at 28a (noting that this aspect of the vocational expert's testimony was based "on her

eleven-year experience as a vocational rehabilitation consultant") (citation omitted).

Petitioner instead challenges (Pet. 22) the ALJ's reliance on the vocational expert's testimony about the "number of jobs available" for the types of work that the expert identified. Even though petitioner was afforded the opportunity to question the expert and to tender his own evidence, however, petitioner did not submit any evidence that contradicted her estimates. Cf. Pet. App. 116a-119a.[4] Indeed, although petitioner sought a more detailed explanation of the basis for the expert's opinion, petitioner did not actually dispute that she had accurately estimated the number of bench-assembler or sorter jobs available in the national economy. Cf. *ibid.* And the ALJ, who was responsible for evaluating the reliability of the vocational expert's testimony, found that testimony to be credible and entitled to "great weight." *Id.* at 111a. In these circumstances, petitioner has failed to show that the ALJ's step-five determination was unsupported by substantial evidence.

2. The court of appeals' decision does not implicate any conflict warranting this Court's review. Petitioner acknowledges (Pet. 12-19) that the court of appeals' decision below accords with decisions of the Second and Ninth Circuits, see *Brault*, 683 F.3d at 449-450; *Bayliss* v. *Barn-*

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[4] Petitioner did submit a "vocational opinion" from a different individual, but the "ALJ appropriately found that [that] opinion was irrelevant" because it addressed jobs that were "completely different from those which the ALJ found that [petitioner] can perform." Pet. App. 72a-73a; see *id.* at 112a (affording "little weight" to that individual's opinion because "the cited jobs are not relevant" and because the opinion assumed characteristics that were not "part of [petitioner's] residual functional capacity").

hart, 427 F.3d 1211, 1217-1218 (9th Cir. 2005), but contends that it conflicts with those of the Seventh Circuit.[5] The two Seventh Circuit cases on which petitioner relies, however—*Donahue* v. *Barnhart*, *supra*, and *McKinnie* v. *Barnhart*, *supra*—involved meaningfully different circumstances.

In *Donahue*, as here, the Seventh Circuit upheld the ALJ's reliance on vocational expert testimony. There, the vocational expert provided testimony that arguably conflicted with the *Dictionary*, but the claimant failed to identify that discrepancy at the hearing. 279 F.3d at 446. The court ultimately concluded that the ALJ did not err in accepting the expert's testimony, reasoning that "[w]hen no one questions the vocational expert's foundation or reasoning, an ALJ is entitled to accept the vocational expert's conclusion, even if that conclusion differs from the *Dictionary*'s." *Ibid.* The court then proceeded to discuss, in dicta, what should happen if the vocational expert's conclusions are the subject of timely objection, and suggested that in those circumstances, "the ALJ should make an inquiry (similar though not necessarily identical to that of Rule 702) to find out whether the purported expert's conclusions are reliable." *Ibid.*[6] The

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[5] While this petition was pending, the First Circuit issued an opinion expressing agreement with the decisions of the Second and Ninth Circuits. See *Purdy* v. *Berryhill*, 887 F.3d 7, 14-17 (2018) (Souter, J.).

[6] Rule 702 provides that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

court observed that "[e]ven in court, however, an expert is free to give a bottom line, provided that the underlying data and reasoning are available on demand." *Ibid.* And the court suggested that the vocational expert there had satisfied that standard by "produc[ing] * * * job titles and numbers" and appearing for cross-examination, which petitioner in that case had failed to undertake on relevant topics. *Ibid.*

Here, as in *Donahue*, petitioner's counsel was afforded the opportunity to cross-examine the vocational expert about her testimony. And as in *Donahue*, petitioner's questioning did not "reveal any shortcomings in the vocational expert's data or reasoning." 279 F.3d at 447. Petitioner thus fails to identify any conflict between *Donahue* and the court's decision below.

Petitioner also fails to identify any square conflict with the Seventh Circuit's decision in *McKinnie*. There, unlike in *Donahue*, the court did sustain a claimant's challenge to an ALJ's reliance on testimony about the "number of jobs [that] were available to [the claimant]" after the claimant had requested, but not received, certain underlying data supporting the vocational expert's opinions. *McKinnie*, 368 F.3d at 911. There, however, the ALJ and vocational expert had apparently agreed to produce that data so long as the claimant "pa[id] for the preparation of the[] materials" that the claimant had requested. *Ibid.* The court rejected that condition, reasoning that the "[t]he data and reasoning underlying a vocational expert's opinions are not 'available on demand' if the claimant must pay for them." *Ibid.* (quoting *Donahue*, 279 F.3d at 446). *McKinnie* thus did not present the question whether a vocational expert's assumed duty of disclosure extends to the expert's confidential client

files. And petitioner has not identified any Seventh Circuit decision applying *McKinnie* in order to require the disclosure of confidential materials. Petitioner thus has failed to demonstrate that, had it been presented with this case, the Seventh Circuit would have reached a different result than the court of appeals below.

Moreover, even in cases not involving confidential information, it is not clear to what extent the Seventh Circuit's approach genuinely differs from that of other circuits. Both the Second Circuit and the court below indicated their "agree[ment] with the Seventh Circuit that evidence cannot be substantial if it is 'conjured out of whole cloth.'" *Brault*, 683 F.3d at 450 (quoting *Donahue*, 279 F.3d at 446); see Pet. App. 22a (same). Similarly, the Ninth Circuit has emphasized that, although "'[a] [vocational expert's] recognized expertise provides the necessary foundation for his or her testimony'" and "'no additional foundation is required,'" a vocational expert's testimony is "not incontestable." *Buck*, 869 F.3d at 1051 (quoting *Bayliss*, 427 F.3d at 1218). That court accordingly vacated and remanded an agency decision in circumstances where the "vast discrepancy between the [vocational expert's] job numbers and those tendered by [the claimant]" were "simply too striking to be ignored" and thus required further inquiry into reliability. *Id.* at 1052. Similarly, the Second Circuit emphasized in *Brault* that it was "*not* hold[ing] that an ALJ *never* need question reliability." 683 F.3d at 450; see also *Purdy* v. *Berryhill*, 887 F.3d 7, 16 & n.12 (1st Cir. 2018) (Souter, J.) (upholding ALJ's reliance on vocational expert testimony without supporting data, but recognizing that in some cases an expert's methodology might be "so unreliable that it cannot constitute substantial evidence"). Meanwhile, the Seventh Circuit itself has recognized

that the Act does not permit "pretrial discovery in Social Security hearings," and it accordingly "refuse[d]" to adopt rules of disclosure that would "drag[] out every Social Security hearing to an interminable length." *Britton* v. *Astrue*, 521 F.3d 799, 804 (2008) (per curiam).

To be sure, as petitioner notes (Pet. 10), several courts of appeals have understood the Seventh Circuit to have adopted a diverging approach and have suggested that its approach "has not been a popular export." Pet. App. 21a (quoting *Brault*, 683 F.3d at 449); see also *Purdy*, 887 F.3d at 16 (stating that "[t]he Seventh Circuit stands alone * * * in imposing a *Daubert*-like requirement on ALJs in Social Security cases"); *Welsh* v. *Commissioner Soc. Sec.*, 662 Fed. Appx. 105, 109-110 (3d Cir. 2016) (similar). But petitioner has not shown that these abstract expressions of disagreement have yielded meaningfully different results. Moreover, the Seventh Circuit cases relied upon by petitioner predate all of the allegedly conflicting decisions, and the Seventh Circuit may well refine or reevaluate its approach in light of the continuing criticisms advanced by other circuits.

3. Review is also unwarranted for the additional reason that SSA has recently issued updated policy guidance expressing the agency's expectation that vocational experts testifying at ALJ hearings should be prepared to identify and describe the factual bases for their testimony. In 2017, SSA updated its *Vocational Expert Handbook*, which sets forth the agency's expectations as to how vocational experts should prepare for ALJ-conducted disability hearings. SSA, *Vocational Expert Handbook* (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf (*Handbook*). The *Handbook* instructs vocational

experts that they "should be prepared to provide a complete explanation for [their] answers to hypothetical questions"; that they "should have available, at the hearing, any vocational resource materials [on which they] are likely to rely"; and that they "should be able to thoroughly explain what resource materials [they] used and how [they] arrived at [their] opinions." *Id.* at 37. The *Handbook* further advises vocational experts that "[i]n some cases, the ALJ may ask [them] to provide relevant portions of materials [they] rely upon." *Ibid.*

The revised *Handbook*, which had not yet been issued at the time of petitioner's ALJ hearing, will help guide the agency's handling of vocational expert testimony in future cases, so that any disagreement among the courts of appeals may be of limited prospective importance. At a minimum, the *Handbook* and the regulations cited above (see pp. 8-9, *supra*) underscore that Social Security disability claimants are already able under current law to challenge the reliability of vocational expert testimony. Petitioner cannot show that imposing the novel mandatory rule he urges, which is not grounded in the statutory or regulatory text, is necessary to provide such an opportunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2018

No. 17-1184

IN THE
Supreme Court of the United States

MICHAEL J. BIESTEK,
Petitioner,

v.

NANCY A. BERRYHILL, ACTING COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

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As three Courts of Appeals, and now also the First Circuit (with Justice Souter writing), *see Purdy v. Berryhill*, 887 F.3d 7, 15-16 (1st Cir. 2018), have explicitly recognized, there is a clear and entrenched conflict on the question presented: In the Seventh Circuit, a vocational expert's opinion cannot constitute substantial evidence of "other work" available to an applicant for social security benefits if the expert refuses to produce, upon demand, the data underlying their opinion. In the Second, Third, Sixth, and Ninth Circuits, the expert's testimony standing alone can constitute "substantial evidence." This case presents an unusually clean vehicle for the Court to resolve this important question that arises in hundreds of thousands of benefits determinations annually. Pet. 20-21.

The Government does not claim any vehicle issue precludes the Court resolving the question presented and, tellingly, devotes the majority of its brief to arguing that the decision below was correct. BIO 8-13. That argument is wrong, *see* Pet. 21-24; *infra* 9-12, and in any event is no reason to deny certiorari when a clear conflict exists. And, the Government's attempt to distinguish away the conflict fails: It concedes that in the Seventh Circuit a vocational expert must produce "the data and reasoning underlying [their] opinions ... on demand," BIO 15 (quoting *McKinnie v. Barnhart*, 368 F.3d 907 (7th Cir. 2004) (per curiam)), and that here the Sixth Circuit affirmed the ALJ's decision notwithstanding that "petitioner's counsel asked the vocational expert to produce data supporting her professional opinions," and the expert refused, *id.* 6-7. Nonetheless, the Government notes in *McKinnie* the expert refused to produce the data due to a lack of monetary

compensation, whereas here the expert refused to produce the data out of a concern for confidentiality. *Id.* 15. But that is no distinction at all. The Seventh Circuit's legal rule applies ***regardless*** of the expert's basis for refusing to produce data upon demand. Indeed courts in the Seventh Circuit have reversed benefits determinations under *McKinnie* precisely because an ALJ permitted an expert not to produce data on the ground that the data was purportedly covered by client confidentiality, *exactly* the situation here. *See Ramzan v. Colvin*, No. 12 C 7362, 2015 WL 5921811, at *7 (N.D. Ill. Oct. 9, 2015). That the Government considers the "SSA guidance," a non-binding orientation handbook, worth discussing at all is surprising. As evidenced by the Government's own quotations, *id.* 17-18, the "guidance" does not even address, let alone resolve, the question presented.

The petition for a writ of certiorari should be granted.

I. THERE IS A CLEAR CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

The Government claims the Sixth Circuit made a "factbound determination" that the ALJ had adequately weighed the credibility of the witnesses in petitioner's proceeding. BIO 10. That characterization of the Sixth Circuit's decision is impossible to square with the decision itself. The vocational expert testified that in light of Mr. Biestek's disability, there would be a reduction in the "sorter and bench assembler jobs by about 20 to 30 percent." Pet. App. 117a. As the Sixth

Circuit recognized, "petitioner's counsel requested the vocational expert produce underlying data or analyses in support of her statements," the expert refused, and "the ALJ declined to require her to produce such information, even in a redacted format." *Id.* 20a, 111a. Petitioner thus "allege[d] reversible error because ... such testimony falls short of 'substantial evidence.'" *Id.* 20a.

The Sixth Circuit acknowledged "the Seventh Circuit obliges vocational experts to provide the data and reasoning used in support of their conclusion upon request," and petitioner "would like us to establish a similar rule for the Sixth Circuit." *Id.* 21a. Recognizing "a divide ... between the Seventh Circuit and several other circuits that have staked out a position," the Sixth Circuit joined the "courts of appeals [that] have followed the Second Circuit's lead," and rejected the Seventh Circuit's rule. *Id.* 20a-21a (citing *Brault v. Comm'r of Soc. Sec.*, 683 F.3d 4439, 449 (2d Cir. 2012); *Welsh v. Comm'r of Soc. Sec.*, 662 F. App'x 105, 109–10 (3d Cir. 2016); *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005)).

The Sixth Circuit's holding is thus the opposite of a "factbound" determination—it is a ruling that as a matter of law a vocational expert's testimony can constitute substantial evidence of the "other work" available to an applicant for social security benefits, even when the expert refuses to produce upon demand the underlying data upon which that testimony is based. And, as the Sixth Circuit acknowledged, its holding squarely conflicts with the rule in the Seventh Circuit. Pet. App. 20a-21a.

The Government argues the Seventh Circuit cases upon which petitioner relies "involved meaningfully different circumstances." BIO 14. That is incorrect. In *McKinnie*, exactly like here, the vocational expert testified regarding "the number of jobs available" to an applicant in light of the applicant's disability. 368 F.3d at 909. Then, again like here, the applicant's lawyer asked the expert to "show us how you arrived at your figures." *Id.* But, once again like here, the ALJ refused to require the expert to "supplement the record with the data and references that she had relied upon," in that case because the applicant would not provide compensation. *Id.* Applying Judge Easterbrook's holding in *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002), that a vocational expert's must make their "underlying data and reasoning ... available on demand," *McKinnie* held "[t]he data and reasoning underlying a vocational expert's opinions are not 'available on demand' if the claimant must pay for them," 368 F.3d at 911.

The sole "meaningfully different circumstance[]," BIO 14, the government points to is that in *McKinnie* the vocational expert's reason for refusing to provide the requested data was the applicant's refusal to pay the expert, whereas here the vocational expert claimed the data contained confidential client files. *Id.* 15-16. The Government does not even attempt to explain why this distinction is relevant. The reason a vocational expert refuses to produce underlying data is wholly irrelevant to the Seventh Circuit's legal rule that the expert's testimony cannot constitute substantial evidence if the data is not produced upon demand by the applicant.

Indeed, in *Ramzan*, a vocational expert refused to produce the data underlying her opinion of the reduced number of jobs available to an applicant in light of his disability. 2015 WL 5921811, at *7. Reversing the ALJ's denial of benefits, the district court observed "[w]hile such work product by a vocational expert may be confidential, the ALJ identified no applicable privilege, and the Court cannot discern one. The ALJ could have ordered their production to Plaintiff's counsel subject to a protective order." *Id.* A refusal to produce underlying documents based on claimed confidentiality is, of course, exactly the situation presented in petitioner's case, and *Ramzan* is only further proof that petitioner's case would have come out differently in the Seventh Circuit.[1]

The Government's other attempts to minimize the disagreement between the Circuits are equally unavailing. *First*, the Government notes that both the Seventh and Second Circuits agree on the unremarkable proposition that "evidence cannot be substantial if it is 'conjured out of whole cloth.'" BIO 16 (quoting *Brault*, 683 F.3d at 450; *Donahue*, 279 F.3d at 446). But courts' agreement that an expert cannot simply make up facts from thin air hardly demonstrates agreement on whether an expert's testimony alone can constitute substantial evidence of other work when the expert refuses to provide the data underlying their opinions. Likewise, that the Second, and Ninth Circuits have held there may be some situations where credibility or

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[1] Precisely because petitioner did not have the data upon which the expert formed her opinions, it is irrelevant that he (like the plaintiff in *Donahue*) was able to cross-examine the expert. *See* BIO 15 (quoting *Donahue*, 279 F.3d at 447).

reliability issues are "too striking to be ignored" speaks not at all to the question presented. *Id.* 16 (quoting *Buck v. Berryhill*, 869 F.3d 1040, 1051 (9th Cir. 2017)).

Second, the Government concedes that "several courts of appeals have understood the Seventh Circuit to have adopted a diverging approach," but claims—without any analysis of the underlying decisions—that "petitioner has not shown that these abstract expressions of disagreement have yielded meaningfully different results." *Id.* 17. Petitioner explained at length how his case would have come out differently had it arisen in the Seventh Circuit, and how it would have come out the same in the Second and Ninth Circuits. *See* Pet. 12-19. There is nothing "abstract" about the fundamentally different legal rules these circuits apply.

Third, the Government's cursory suggestion that the Seventh Circuit might "reevaluate its approach" is probably false. *Britton v. Astrue*, 521 F.3d 799, 804 (7th Cir. 2008), which the Government quotes, "refus[ed] to endorse a system that drags out every Social Security hearing to an interminable length." *Britton* then *reaffirmed*—three years after the Ninth Circuit's contrary decision in *Bayliss*—the *McKinnie* rule that "data underlying a [vocational expert's] testimony must be available on demand to facilitate cross-examination and testing of the [vocational expert's] reliability," and suggested ways to manage the disclosure obligation efficiently. *Id.* Moreover, the *McKinnie* rule is followed every day in benefits proceedings within the Seventh Circuit, and district courts reverse benefits

determinations in the rare instances in which an ALJ erroneously allows an expert to refuse disclosure.[2]

II. THE NON-BINDING SSA VOCATIONAL EXPERT HANDBOOK HAS NO RELEVANCE TO THE QUESTION PRESENTED.

The Government suggests that "in light of recent updates to SSA guidance, any disagreement [on the question presented] *may* be of little prospective importance." BIO 8 (emphasis added). Even that equivocal invocation of the guidance dramatically overstates its importance—it is entirely irrelevant to the issues here.

The "SSA guidance" is an update to an existing, purely advisory, handbook provided to new vocational experts which, by its own description, "provides the basic information you will need when you participate in administrative law judge . . . hearings." *See* SSA, *Vocational Expert Handbook* at i (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf (*Handbook*). The *Handbook*—directed as it is to vocational experts—contains no guidance at all for ALJs, let alone a requirement that ALJs cannot accept an expert's testimony as "substantial evidence" when the expert refuses to disclose upon demand the data underlying

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[2] *See, e.g., Morrow v. Berryhill*, No. 16 C 8430, 2017 WL 4164171, at *2 (N.D. Ill. Sept. 20, 2017) ("[T]he ALJ erred by refusing plaintiff's request for production of the VE's surveys."); *Ramzan*, 2015 WL 5921811, at *7.

their opinions. In short, the *Handbook* has no relevance to the question presented.

Even as regards vocational experts, the *Handbook* does not address the question of the disclosures an expert must make to applicants. For one, the *Handbook* is an entirely non-binding collection of advice and guidelines, and the Government does not suggest to the contrary.[3] Thus, given that the issue here only arises when experts refuse to turn over voluntarily the data underlying their opinions, non-mandatory guidance achieves nothing. But, even if the guidance here were mandatory, the *Handbook* says ***nothing*** about an expert's disclosure obligations. The *Handbook* advises that experts: "should be prepared to provide a complete explanation for [their] answers to hypothetical questions;" "should have available . . . any vocational resources materials [on which they] are likely to rely;" and "should be able to thoroughly explain what resource materials [they] used and how [they] arrived at [their] opinions." BIO 18 (quoting *Handbook* at 37) (alterations in original). The Government's quotations are notable for what they *do not* say: that experts must produce upon demand the data underlying their opinions to applicants. Thus, because it does not address the issue upon which courts are divided, the *Handbook* simply

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[3] Courts agree the Handbook "does not set out a list of requirements," and applicants *cannot* challenge an ALJ's reliance on vocational expert testimony merely because the expert failed to meet the Handbook's criteria. *Black v. Berryhill*, No. 2:17 CV 00153, 2018 WL 1472525, at *24 (D. Utah. Mar. 7, 2018).

does not render "any disagreement among the courts of appeals . . . of limited prospective importance." *Id.* 18.

The Government's claim that "[a]t a minimum" the *Handbook* demonstrates social security benefits applicants are already able "to challenge the reliability of vocational expert testimony" is of no moment. *Id.* While various means exist through which an applicant can challenge a testifying expert, that does not ameliorate the problem that arises when an expert propounds opinions about the number of jobs available after accounting for an applicant's disability, but then refuses to produce the data underlying that opinion so the applicant can challenge the expert's methodology and conclusions. The fact that an applicant may have other means of challenging an expert's reliability does not address the applicant's ability to hold the Government to its burden on this critical point.

III. THE SIXTH CIRCUIT'S DECISION IS INCORRECT.

The Government devotes the majority of its brief to arguing that the Sixth Circuit's decision was correct. BIO 8-13. Even if the Government were correct on the merits, that is not a reason to deny certiorari. But, in any event the Government is incorrect.

In satisfying its burden to demonstrate "other work" available to an applicant, the Government frequently relies upon the testimony of vocational experts. As the Seventh Circuit recognized, "[p]resumably a vocational expert establishes the foundation for her opinions before she expresses them at a hearing." *McKinnie*, 368 F.3d

at 911. Thus, as was the case here, if a vocational expert opines that 6,000 "bench assembler" jobs exist in Southeast Michigan, and the number of available jobs should be reduced by 20 to 30 percent based on petitioner's disability, she presumably has a statistical source for that information or else she would have no basis for furnishing the opinion. Yet, despite the fact that the data exists, the Government nonetheless claims an expert's testimony alone can constitute "substantial evidence" of the jobs available to an applicant, even when the expert refuses to produce the data upon demand. The Government's arguments in support of its position are not persuasive.

First, the Government argues "[a]n ALJ . . . need not determine that a vocational expert has satisfied the requirements for expert testimony under Federal Rule of Evidence 702, or any other evidentiary rules applicable in court, before her testimony may be admitted and relied upon at a disability benefits hearing." BIO 8. This argument is a strawman. Petitioner has never argued that the Federal Rules of Evidence apply in social security proceedings, or that a vocational expert's obligation to disclose their underlying data arises from the Rules. To the contrary, as Judge Easterbrook correctly underscored in *Donahue*, "the idea that experts should use reliable methods *does not depend on Rule 702 alone*, and it plays a role in the administrative process because every decision must be supported by substantial evidence." 279 F.3d at 446 (emphasis added). Likewise, Petitioner has no quarrel with the general proposition that ALJs may "consider a broader range of potentially relevant

information than would be admissible in an ordinary court of law." BIO 10. But that high-level description of the admissibility rules in social security hearings is unresponsive to petitioner's, and the Seventh Circuit's, point that an expert cannot provide "substantial evidence" by refusing to produce their underlying data and relying on say-so alone.

Second, the Government notes that an applicant is permitted "to question a vocational expert . . . regarding the basis for the expert's testimony and to present arguments concerning the reliability of that testimony." *Id.* 9. Similarly, the Government notes that an applicant can "raise objections to the reliability of the vocational expert's testimony." *Id.* 10. But these procedural safeguards are effectively meaningless if an applicant is denied access to the data underlying an expert's opinion that would allow the applicant to delve into the expert's methodology and expose (through objections or cross-examination) inconsistencies or flaws in the data and opinions. It is no answer, moreover, for the Government to claim that petitioner "did not submit any evidence that contradicted [the expert's] estimates." *Id.* 13. It was the *Government's* burden to demonstrate the number of jobs available to petitioner and thus petitioner need not have introduced any evidence at all. And, before both the ALJ and the Court of Appeals, petitioner argued that the Government could not sustain its burden by relying on the expert's testimony alone when the expert refused to produce her underlying data.

Third, the Government argues that petitioner has identified no "statute, regulation, or decision of this Court" that requires the Seventh Circuit's rule. *Id.* 11.

But, the Social Security Act requires an ALJ's decision be supported by "substantial evidence," 42 U.S.C. § 405(g), and this standard "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). The Government claims the ALJ could satisfy this standard by relying on the expert's "11 years of professional experience as a vocational rehabilitation consultant," BIO 8, yet it never even attempts to explain how 11 or even 111 years of experience would allow an expert to opine on the percentage by which the number of bench assembler jobs available in Southeast Michigan from 2009-2013 should be reduced due to a particular disability. *See Barrett v. Barnhart*, 355 F.3d 1065, 1067 (7th Cir. 2004) ("For [the vocational expert] to offer the number 24,500 with no indication of how he adjusted the numbers in the dictionary to reflect Barrett's diminished capacity leaves us in the dark about the actual basis of his testimony" (Posner, J.)). That opinion could only be based on a statistical data source, and absent production of the source the ALJ could not rely upon the expert's testimony.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] Sensibly, the Government does not contest that federal courts have myriad ways of ensuring the confidentiality of material produced to opposing parties.

Respectfully submitted,

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May 21, 2018

No. 17-1184

IN THE
Supreme Court of the United States

MICHAEL J. BIESTEK,
Petitioner,

v.

COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

MOTION FOR LEAVE TO DISPENSE WITH PREPARATION OF JOINT APPENDIX

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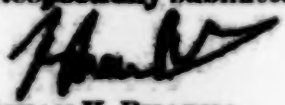
Pursuant to Rule 26.8 of the Rules of this Court, Petitioner respectfully seeks leave to dispense with the requirement of a joint appendix.

The Court granted certiorari to consider the following question of law: "whether a vocational expert's testimony can constitute substantial evidence of 'other work,' 20 C.F.R. § 404.1520(a)(4)(v), available to an applicant for social security benefits on the basis of a disability, when the expert fails upon the applicant's request to provide the underlying data on which that testimony is premised." Rule 26.1 provides that the joint appendix need not include any items that are already reproduced in the appendix to the petition for writ of certiorari. In this case, the appendix to the petition for a writ of certiorari includes the relevant decisions from the Sixth Circuit, District Court, and administrative hearing. In Petitioner's view, no other portion of the record merits special attention such as would warrant the preparation and expense of a joint appendix, and preparation of a joint appendix would not materially assist the Court's consideration of the case.

Respondent does not object to dispensing with the preparation of a joint appendix.

Respectfully submitted,



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For the Sixth Circuit

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QUESTION PRESENTED

When assessing an applicant's eligibility for social security benefits on the basis of a disability, an administrative law judge ("ALJ") must determine whether the applicant "can make an adjustment to other work." 20 C.F.R. § 404.1520(a)(4)(v). This determination must be supported by substantial evidence. *See* 42 U.S.C. § 405(g). In making the determination, an ALJ is authorized to call a vocational expert to testify about other work available to an applicant. *See* 20 C.F.R. §§ 404.1566(e), 416.966(e). These assessments occur hundreds of thousands of times annually.

The question presented is:

Whether a vocational expert's testimony can constitute substantial evidence of "other work," 20 C.F.R. § 404.1520(a)(4)(v), available to an applicant for social security benefits on the basis of a disability, when the expert fails upon the applicant's request to provide the underlying data on which that testimony is premised.

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SSA, *Vocational Expert Handbook* (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf 4, 10, 11, 12, 14, 53

SSR 00-4P, 2000 WL 1898704 (Dec. 4, 2000) 54

SSR 96-9P, 1996 WL 374185 (July 2, 1996) 16

OPINIONS BELOW

The decision of the Sixth Circuit (Pet. App. 1a) is reported at 880 F.3d 778 (6th Cir. 2017). The decision of the district court (Pet. App. 25a) is unreported.

JURISDICTION

The judgment of the Sixth Circuit was entered on December 27, 2017.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 405(b)(1) provides:

> Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure.

42 U.S.C. § 405(g) provides:

> The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive.

42 U.S.C. § 423(d)(2)(A) provides:

> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the

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[1] The district court had jurisdiction over this case pursuant to 42 U.S.C. § 405(g).

> national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

42 U.S.C. § 1382c(a)(3)(B) provides:

> [A]n individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country

20 C.F.R. § 404.1520(a)(4)(v) provides:

> At the fifth and last step, we consider our assessment of your residual functional capacity and your age, education, and work experience to

see if you can make an adjustment to other work. If you can make an adjustment to other work, we will find that you are not disabled. If you cannot make an adjustment to other work, we will find that you are disabled.

INTRODUCTION

Under 20 C.F.R. § 404.1520(a)(4) and 20 C.F.R. § 416.920(a)(4), an applicant must satisfy a "five-step sequential evaluation process" in order to demonstrate eligibility for social security benefits in light of a disability. *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003). For the first four steps—through which an applicant must demonstrate the existence of a severe, medically determinable impairment that renders the applicant unable to perform his or her prior work—the applicant bears the burden of proof. If the applicant fails to meet this burden, he or she is deemed not disabled, and social security benefits are denied. If the applicant satisfies the first four steps, however, the burden shifts at the fifth step to the Social Security Administration ("agency"), which must demonstrate that the applicant can "make an adjustment to other work" and thus does not qualify for benefits. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). Upon judicial review, every factual finding made by the Administrative Law Judge ("ALJ")—including the ALJ's findings on each of the five steps—must be supported by substantial evidence to be deemed conclusive. *See* 42 U.S.C. § 405(g).

To satisfy its burden of proof in demonstrating the existence of "other work" available to applicants, the agency invariably relies upon the testimony of "vocational experts"—hired witnesses who are meant to

"provid[e] impartial expert opinion evidence about an applicant's vocational abilities." SSA, *Vocational Expert Handbook* at 7 (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf (*Vocational Expert Handbook*). These experts testify on two key points: the type of jobs available to an applicant and the number of such jobs that exist in the national economy.

At Petitioner Michael Biestek's disability benefits hearing, a vocational expert opined that Petitioner could have performed certain "sedentary unskilled occupations," specifically "bench assembler" and "sorter." Pet. App. 117a. Next, the expert opined that between 1000 and 8000 such jobs existed in Southeast Michigan within the relevant timeframe. The expert further testified that even an applicant with additional physical limitations would be able to perform the identified jobs, although the number of bench assembler and sorter jobs would drop by "about 20 to 30 percent." Pet. App. 117a.

Petitioner's lawyer questioned the accuracy of these figures and asked the expert for her data sources. In response, the expert referenced the *Bureau of Labor Statistics* "as well as [her] own individual labor market surveys." Pet. App. 119a. When Petitioner's lawyer asked for those surveys the expert refused to provide them in any form out of a concern for the "confidentiality of her files." Petitioner's lawyer pressed the issue and proposed a solution to ameliorate the "confidentiality" concern, but the ALJ cut off this line of inquiry. As a result, the expert's conclusion regarding the "other work" available to Petitioner—the sole basis for the

agency's denial of benefits for the designated period—was insulated from any meaningful scrutiny or evaluation.

In affirming the ALJ's ruling, the Sixth Circuit held that the testimony of a vocational expert, by itself, could constitute substantial evidence of the "other work" available to an applicant, even when the expert's testimony was based on data the expert withheld on cross-examination.

That decision is wrong. It fails to require "substantial evidence" supporting the ALJ's findings to sustain those findings on judicial review. It forecloses any meaningful assessment of the reliability of the expert's sources and the logic of the expert's methodology. It violates this Court's direction that the process for determining eligibility for Social Security disability benefits be fair and efficient. And it defies common sense. If the expert's opinion has a basis in real and reliable sources, there is no reason in law or logic why the expert should withhold those sources upon the applicant's express request. If, by contrast, the expert has no source for conclusions about the number of jobs available to an applicant, the expert's testimony standing alone cannot constitute substantial evidence of the other work available to an applicant.

Since 2002, the Seventh Circuit has required vocational experts to provide upon request the data upon which their testimony is based in order for the expert's testimony to constitute substantial evidence. That rule complies with Congress's mandate that the agency's factual findings be supported by substantial evidence in order to be conclusive upon judicial review.

And the rule works. Over the last sixteen years, the Seventh Circuit has enforced this rule without compromising the efficiency, finality, or fairness of social security hearings. This rule is also consistent with the agency's policies requiring vocational experts to testify consistent with the data sources upon which they rely.

The decision of the Sixth Circuit should be reversed.

STATEMENT OF THE CASE

I. Social Security Disability Benefits

"From its inception, the social security system has been a program of social insurance" that provides "protection against the economic consequences of old age, disability, and death." *Califano v. Goldfarb*, 430 U.S. 199, 208 (1977). Undoubtedly, the "size and extent" of the program is "difficult to comprehend." *Richardson v. Perales*, 402 U.S. 389, 399 (1971). Yet, as this Court has instructed, the social security system "must be fair—and it must work." *Id.* (quoting Gov't's Br.).

A. Statutory Framework

The Social Security Act, passed in 1935, provides monetary benefits to individuals "whose disability prevents them from pursuing gainful employment." *Heckler v. Day*, 467 U.S. 104, 106 (1984). Under Title II of the Act, individuals may receive social security disability insurance (SSDI) benefits if they have a qualifying disability and are fully insured under the program. 42 U.S.C. § 423; *see id.* § 414 (defining "fully insured"). Under Title XVI of the Act, individuals may receive supplemental security income (SSI) benefits if they have a qualifying disability and meet a low-income

requirement. 42 U.S.C. § 1381. Both programs define qualifying disabilities in the same way. *See Sullivan v. Zebley*, 493 U.S. 521, 525 (1990) ("[The] statutory definition of disability [for SSI benefits] was taken from Title II of the Social Security Act."); *compare* 20 C.F.R. § 404.1505 *et seq.* (disability determinations for SSI benefits), *with id.* § 416.905 *et seq.* (disability determinations for SSDI benefits).

In 1939, Congress added a judicial review provision to the Act. The provision states, "[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). In adding this provision, Congress envisioned a judicial review process "similar to those made for the review of decisions of many administrative bodies." H.R. Rep. No. 76-728, at 43 (1939); S. Rep. No. 76-734, at 52 (1939) (same). Congress has since confirmed that it intended "common procedural safeguards provided under the Social Security Act and the Administrative Procedure Act," including "the same rights to hearing and administrative and judicial review." H.R. Rep. No. 94-679, at 2-3 (1975).

At the same time that it provided for judicial review of social security determinations, Congress also clarified the procedures applicable in social security hearings: "Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure." 42 U.S.C. § 405(b). Through this language, Congress "widen[ed] the scope and . . . improve[d] the adequacy and the administration of these programs." H.R. Rep. No. 76-728, at 5. Consideration of evidence

beyond that normally permitted under formal rules of evidence "improv[ed]" benefits determinations by allowing consideration of all relevant information. *See Hearings Relative to the Social Security Act Amendments of 1939 Before the H. Comm. on Ways and Means*, 76th Cong. 3 (1939) (quoting proposed changes to the Social Security Act attached to letter of Dr. Arthur J. Altmeyer, Chairman, Social Security Board (Dec. 30, 1938)). Likewise, when Congress revisited this language in 1975, it explained that Title II of the Social Security Act is governed by the Administrative Procedure Act, which in turn "permits consideration of hearsay evidence while preserving the right of cross-examination." *Delays in Social Security Appeals: Hearings Before the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 94th Cong. 9 (1975) (quoting Am. Bar Ass'n Brief Amicus Curiae at 12, *Richardson v. Perales*, 402 U.S. 389 (1971), 1970 WL 136652). Congress harmonized Title XVI with Title II and the Administrative Procedure Act, such that disability hearings are not governed by formal rules of evidence but nonetheless guarantee "adequate notice, access to evidence, [and the] right to cross examination." *Id.* at 10.

B. Disability Determinations

The Commissioner of Social Security is authorized to make factual findings and decisions "as to the rights of any individual applying for" social security disability benefits. 42 U.S.C. § 405(b)(1). Those findings and decisions take place in a tiered review process. To begin, an applicant submits a written application that results in an initial disability determination. Depending on the

applicant's state of residence, either the federal agency or a state counterpart makes that determination. 20 C.F.R. §§ 404.1503, 416.903. An applicant dissatisfied with the initial determination may seek reconsideration, or request a hearing before a disability hearing officer, or both. 20 C.F.R. §§ 404.902, 404.907; *id.* §§ 416.1402, 416.1407; *id.* §§ 404.914, 416.1414. If that hearing does not yield a satisfactory result, an applicant may seek a new hearing before an ALJ. 20 C.F.R. §§ 404.920, 416.1429. The applicant may appeal the ALJ's decision to the Appeals Council. 20 C.F.R. §§ 404.967, 416.1467. Applicants who exhaust these procedures may finally seek judicial review. 20 C.F.R. §§ 404.981, 416.1481; *see also* 42 U.S.C. § 405(g).

To qualify for either SSI or SSDI benefits on the basis of disability, an applicant must satisfy a five-step test. *First*, the applicant must not be engaged in any substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). *Second*, the applicant must have a severe medically determinable physical or mental impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). *Third*, if the applicant's impairment meets or equals an impairment listed in Appendix 1 of the Commission's regulations, the applicant is disabled and therefore eligible for benefits. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

If the applicant's impairment does not satisfy the third step, two steps remain. Thus, *fourth*, the applicant must be unable to perform his or her prior work. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). And, *fifth*, the applicant must be unable, based on impairment, age, education, and work experience, to adjust to other work

available in the national economy—defined as "work which exists in significant numbers either in the region where such individual lives or in several regions in the country." 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see also* 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). Failure on any step, except for step three, renders the applicant ineligible for social security benefits.

The applicant bears the burden of proof for the first four steps. At the fifth step, however, the burden shifts to the agency to "provide evidence about the existence of work in the national economy that [the applicant] can do," taking into account the applicant's "residual functional capacity . . . , age, education, and work experience." 20 C.F.R. §§ 404.1512(b)(3), 416.912(b)(3) (internal citations omitted).

C. Vocational Experts

To meet its burden at step five, the agency "may use the services of a vocational expert or other specialist." 20 C.F.R. §§ 404.1566(e), 416.966(e). Vocational experts are hired by the agency to "provid[e] impartial expert opinion evidence . . . that an ALJ considers when making a decision about disability." *Vocational Expert Handbook* at 3. "Indeed, from an institutional perspective, the primary purpose of vocational expert testimony is to meet [the agency's] burden of proof in denying benefits to a disability claimant." 2 Thomas E. Bush, *Social Security Disability Practice* § 340 (2d ed. 2017). A vocational expert should have "[u]p-to-date knowledge of, and experience with, industrial and occupational trends and local labor market conditions," "[i]nvolvement in or knowledge of vocational

counseling" and the job placement of adults with disabilities, and experience using certain vocational resources published by the government. *Vocational Expert Handbook* at 8. But those qualifications are not mandatory. Indeed, "there are no readily available published standards for [vocational expert] certification, selection, or training." Jon C. Dubin, *Overcoming Gridlock:* Campbell *After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs*, 62 Admin. L. Rev. 937, 968 (2010). As a result, "the experience, knowledge, ability, understanding of the [vocational expert] role, and the prejudices of individual [vocational experts] vary much more widely than do the comparable skills and experience of medical experts." Nathaniel O. Hubley, *The Untouchables: Why a Vocational Expert's Testimony in Social Security Disability Hearings Cannot Be Touched*, 43 Val. U. L. Rev. 353, 368 n.56 (2008) (quoting Thomas E. Bush, *Social Security Disability Practice* § 340 (2006)). Vocational experts "often rely on assertions of personal knowledge, experience, or unspecified industrial surveys to justify job incidence conclusions." *Overcoming Gridlock*, 62 Admin. L. Rev. at 966. Courts and commentators have "expressed concern with the source and validity of the statistics that vocational experts trot out in social security disability hearings." *Alaura v. Colvin*, 797 F.3d 503, 507 (7th Cir. 2015) (internal citations omitted). In some instances, the conclusions offered by vocational experts seem "likely . . . to be a fabrication." *Id.* at 508.

As noted above, the ALJ must determine at step five whether there is other work available to the applicant.

Frequently, ALJs make this determination by asking vocational experts hypothetical questions regarding other available work. As the agency recognizes, the ALJ uses hypothetical questions because, "in many cases, the ALJ will not have determined what the claimant's [residual functional capacity] is when he or she asks [the vocational expert] for opinions about work." *Vocational Expert Handbook* at 35-36. Thus, for example, at Petitioner's hearing, the ALJ asked the vocational expert about the availability of unskilled light work, unskilled sedentary work, and unskilled work under the sedentary level. Pet. App. 116a-117a.

The ALJ will also take administrative notice of "reliable job information available from various governmental and other publications," including the *Dictionary of Occupational Titles* (*DOT*), the Bureau of the Census' *County Business Patterns* and *Census Reports*, the SSA's *Occupational Analyses*, and the Bureau of Labor Statistics' ("BLS") *Occupational Outlook Handbook*. 20 C.F.R. §§ 404.1566(d), 416.966(d). Vocational experts typically rely, at least in part, on those types of publications. But each publication has limitations. The *DOT*, for example, lists the job requirements for highly specific positions. *See, e.g.*, *DOT* 311 Waiters/Waitresses, and Related Food Service Occupations (listing, under separate job codes, "banquet, head," "captain," "head," "bar," "dining car (r.r. transp.)," "formal," "informal," "room service," "take out," and "buffet"). The ALJ and vocational expert, therefore, can pinpoint which waiter/waitress jobs an unskilled individual can perform (such as a take-out waiter/waitress) and which they cannot (such as head

waiter/waitress for a banquet). But "[t]he *DOT* . . . just *defines* jobs. It does not report how many such jobs are available in the economy." *Brault v. Soc. Sec. Admin.*, 683 F.3d 443, 446 (2d Cir. 2012) (emphasis in original).

Census data from the BLS contain information regarding the number of jobs available at metropolitan, state, and national levels. But the BLS aggregates jobs numbers for categories broader than those in the *DOT*. Thus, for example, BLS data will show the number of "waiter/waitress" jobs available nationally and by state but will not show which of these waiter/waitress jobs require unskilled or skilled labor, or which require heavy, medium, light, or sedentary exertion. *See, e.g.*, Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Employment Statistics: Occupational Employment and Wages, May 2017: 35-3031 Waiters and Waitresses (Mar. 30, 2018), https://www.bls.gov/oes/current/oes353031.htm. The *Occupational Employment Quarterly*, a private publication, provides jobs numbers at a greater level of specificity than the BLS. But it uses data categorized under the Bureau's Standard Occupational Classification System (SOC), a more recent categorization system than the *DOT*. Thus, taking the *categories* of jobs from the *DOT* and matching them with the *numbers* of jobs in the *Occupational Employment Quarterly* requires analysis and judgment calls. "[A] VE must use some method for associating SOC-based employment numbers to DOT-based job types. The problem, however, is that DOT codes are much more granular than SOC codes," with thousands more job titles in the *DOT* than in the SOC. *Brault*, 683 F.3d at 446.

Vocational experts often resort to other sources of data for their testimony as well. Especially for the availability of sedentary unskilled jobs, vocational experts "tend to testify about numbers of jobs based on faulty assumptions with little or no support for their conclusions other than their own 'personal experience.'" 2 *Social Security Disability Practice* § 348.8 (2d ed. 2017). By way of illustration, a vocational expert might be asked to further refine job numbers to estimate, for example, the number of "bench sorter" jobs that permit individualized accommodations like unscheduled breaks for sitting. *Cf. id.* § 340 ("[W]hile vocational experts do have some expertise in assessing vocational opportunities, they have virtually no expertise in assessing how many jobs exist for a particular [residual functional capacity]."). None of the publicly available data sources evaluate the availability of work with these types of limitations. Thus in testifying on such questions, vocational experts rely upon privately sourced data.

Whatever the vocational expert relies upon, the expert should "be prepared to cite, explain, and furnish any sources [for his or her] testimony." *Vocational Expert Handbook* at 3, 19, 20, 28, 31. According to the agency's guidance, "[t]he ALJ will not rely on [the vocational expert's] testimony alone to make his or her ultimate decision about disability or any of the vocational findings that go into the decision." *Id.* at 9. But these guidelines are not binding on vocational experts or the ALJs. Thus, if a vocational expert refuses to provide his or her sources, the applicant has no means of examining whether the expert's conclusions are the

result of a reliable methodology applied to reliable data. Unless, that is, the hearing takes place within the Seventh Circuit.

II. Factual Background

Petitioner Michael Biestek worked for most of his career building scaffolding on construction sites. Pet. App. 3a, 109a. He became unemployed in June 2005 and has remained unemployed since due to depression, Hepatitis C, and lower back pain caused by a degenerative disc disease. Pet. App. 3a. Petitioner applied for social security disability benefits in March 2010, identifying the onset date for his qualifying disabilities as October 28, 2009. Pet. App. 3a.

After protracted proceedings, an ALJ denied Petitioner's application for benefits from October 28, 2009, his alleged onset date, to May 2013. The ALJ found Petitioner was not engaged in any substantial activity, had a severe medically determinable physical or mental impairment, and could not perform his prior work. Pet. App. 82a-83a, 108a. But the ALJ found Petitioner could perform other work that was readily available. Pet. App. 89a-90a, 109a-110a. In making this finding, the ALJ relied solely on the testimony of a vocational expert, who opined that Petitioner could perform the sedentary, unskilled job of a "bench assembler," with 240,000 jobs nationally and 6,000 jobs in Southeast Michigan, and a "sorter," with 120,000 jobs nationally and 1,500 jobs in Southeast Michigan. Pet. App. 111a, 116a. The vocational expert also opined that the number of bench assembler and sorter jobs would erode by 20 to 30 percent if the jobs were limited to only those that

could be performed under a sedentary exertion level.[2] Pet. App. 116a-117a.

At the hearing, Petitioner's counsel attempted to cross-examine the vocational expert about the foundation for her conclusions. The vocational expert testified that she relied on her "professional experience," "job analysis," and "individual labor market surveys" in estimating the number of jobs available to Petitioner, taking into account his individualized limitations. Pet. App. 117a-119a. But when asked to provide the "job analysis" and "individual labor market surveys," she refused. The expert testified that the information supporting her conclusions was "part of people's private confidential files" or "part of client files." Pet App. 118a-119a. When Petitioner's counsel suggested the expert redact any confidential information from her sources, the ALJ interjected, "I'm not requiring that." Pet. App. 118a; *see also id.* 119a. Petitioner's counsel was therefore unable to probe whether the sources that the vocational expert identified actually supported her testimony on the number of jobs available to Petitioner. The vocational expert's testimony, alone, resulted in the ALJ determining that Petitioner was not eligible for disability benefits.[3] *See* Pet. App. 109a-112a.

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[2] The agency recognizes that some individuals have a residual functional capacity "for less than a full range of sedentary work." SSR 96-9p, 1996 WL 374185, at *1 (July 2, 1996).

[3] The ALJ found Petitioner eligible for disability benefits beginning in May 2013, because his advanced age at that time seriously impacted his ability to adjust to other work. Pet. App. 112a; *see* 20

On review, the district court upheld the ALJ's ruling, concluding substantial evidence supported the finding that other work was available to Petitioner. The district court ruled that the vocational expert's testimony on this point was sufficient even though the expert refused to provide any of the data underlying her testimony. *See* Pet. App. 28a-30a.

The Sixth Circuit affirmed. It rejected any "oblig[ation for] vocational experts to provide the data and reasoning used in support of their conclusions upon request." Pet. App. 21a. The court recognized a circuit split "between the Seventh Circuit and several other circuits" on the key issue: whether a vocational expert's testimony constitutes substantial evidence of other work when the expert withholds sources that allegedly support his or her bottom-line conclusions. Pet. App. 20a. The court reasoned that requiring a vocational expert to supply the foundation for his or her opinion would "effectively import a key provision of the Federal Rules of Evidence into Social Security proceedings." Pet. App. 21a. The requirement, the court believed, would conflict with Congress's intent to "specifically exempt[] Social Security disability proceedings from the strictures of the Federal Rules of Evidence, [and] allow[] ALJs to consider a broader range of potentially relevant information than would be admissible in an ordinary court of law." Pet. App. 21a.

C.F.R. §§ 404.1563(d), 416.963(d). That determination is not at issue here.

SUMMARY OF ARGUMENT

A vocational expert's testimony cannot constitute "substantial evidence" of "other work," 42 U.S.C. § 405(g), if the vocational expert refuses upon request to provide the data underlying that testimony.

I.A. As this Court held in *Richardson v. Perales*, 402 U.S. 389 (1971), in a social security hearing, an expert's conclusions must have evidentiary support and be subject to meaningful cross-examination to constitute "substantial evidence." *Perales* also recognized that when applicants fail to avail themselves of available processes for probing expert conclusions, they effectively acquiesce to the substantiality of the evidence. *Perales* thus bars an ALJ from refusing an applicant's request for data underlying the vocational expert's conclusions. Without the underlying data, there is no way to assess the vocational expert's evidentiary support or subject the vocational expert's conclusions to even a modicum of meaningful testing through cross-examination. Requiring production only upon request achieves both of these objectives while preserving expediency and efficiency in social security proceedings, as *Perales* commands.

I.B. The statutory requirement that an agency's factual findings be supported by substantial evidence applies in various other regulatory contexts. This Court's decisions in those contexts confirm that conclusions by agency experts that lack an identifiable foundation in facts cannot constitute substantial evidence. Indeed, many cases require the production of an expert's underlying data and confirm that an agency

decision-maker must be able to test an expert's conclusion by reference to the data. Even in the rare case where this Court has accepted an expert's testimony without the provision of first-hand evidence, the Court's reasoning underscores this general requirement.

II.A. Requiring vocational experts to provide upon request the data underlying their conclusions does not import the Federal Rules of Evidence or the requirements of *Daubert* into social security proceedings. As exhibited over the past sixteen years in the Seventh Circuit, this rule is limited in scope and measured in its impact on the length of hearings and the burden on both ALJs and vocational experts.

II.B. Although the Federal Rules of Evidence do not apply in social security hearings, in passing the Social Security Act, Congress did not eliminate the fundamental common-law requirement that expert testimony be reliable before a decision-maker can rationally rely upon it. The most critical means of assessing the reliability of an expert's testimony is through meaningful cross-examination that tests the rigor of an expert's methodology and the legitimacy of the expert's data. If the vocational expert withholds the data upon request, the applicant and the agency lack the tools necessary to conduct this critical assessment of reliability.

II.C. A vocational expert's experience and credibility do not assure reliable conclusions. Credibility asks whether an expert is truthful; and, indeed, where testimony does not rely upon actual data, professional

experience may constitute a sufficient basis for an expert's conclusions. But reliability asks whether factual evidence actually supports an expert's conclusion. Credibility and experience cannot identify how many jobs of a particular sort exist in a defined geographic region at a specific point in time. Underlying data is necessary to reach this type of a conclusion, and the provision of this data is thus necessary to assess whether a vocational expert's conclusions are actually grounded in fact.

III. Finally, requiring a vocational expert to provide the underlying data upon request is consistent with the agency's policies and with common sense. The agency itself, in nonbinding guidance, advises vocational experts to be prepared to furnish their underlying data at disability determination hearings, and informs vocational experts that an ALJ will not rely solely on their testimony when determining whether "other work" exists in sufficient numbers. In other guidance, the agency charges ALJs with analyzing data sources that are inconsistent with the vocational expert's testimony before the ALJ may accept the expert's testimony as conclusive. This same rationale should govern here.

In order to assure that the agency has met its burden of demonstrating the existence of other work with more than merely the uncorroborated say-so of a vocational expert, ALJs should require that the expert's underlying data be provided upon request. If the evidence exists, the vocational expert can efficiently provide it, as the Seventh Circuit's rule demonstrates. If it does not exist, the agency and reviewing court can

then probe what possible basis the expert might have for his or her testimony in the first place.

ARGUMENT

I. A VOCATIONAL EXPERT'S TESTIMONY CANNOT CONSTITUTE "SUBSTANTIAL EVIDENCE" OF "OTHER WORK" UNDER 42 U.S.C. § 405(g) IF THE VOCATIONAL EXPERT REFUSES TO PROVIDE, UPON REQUEST, THE DATA UNDERLYING THAT TESTIMONY.

In interpreting provisions of the Social Security Act, this Court begins, "as usual, with the statutory text." *Maslenjak v. United States*, 137 S. Ct. 1918, 1924 (2017); *see also Gisbrecht v. Barnhart*, 535 U.S. 789, 799 (2002). The relevant statutory provision here provides "[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Under this Court's well-established precedent, "substantial evidence" requires more than the say-so of a vocational expert. It requires reliable expert testimony subject to meaningful probing by an adverse party or the decision-maker. The Sixth Circuit's decision below disregards this requirement.

A. *Richardson v. Perales* Mandates That Vocational Experts Provide The Data Underlying Their Conclusions Upon An Applicant's Request.

1. *Perales* identifies various indicia of reliability that expert testimony must possess to constitute "substantial evidence" under § 405(g).

In *Richardson v. Perales*, this Court considered the precise question of what "substantial evidence" requires for expert evidence introduced at disability hearings. 402 U.S. at 401. In approaching this question, the Court emphasized that the standards governing disability determinations "should be understandable to the layman applicant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation." *Id.* 400-01. Consistent with "the obvious intent of Congress," hearings should be "informal rather than formal"—"so long as the procedures are fundamentally fair." *Id.*

Cognizant of the requirements that social security benefits proceedings be efficient, accessible, and fair, the Court determined that "substantial evidence" in this context means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 401 (quoting *Consolidated Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 230 (1938)). Material presented to the agency "without a basis in evidence having rational probative force" cannot constitute "substantial evidence." *Perales*, 402 U.S. at 407 (internal quotation marks omitted).

The Court then applied this standard to the expert evidence introduced at the applicant's hearing. The applicant in *Perales* challenged written reports submitted by four licensed physicians who had examined the applicant but who did not testify at the hearing. The applicant argued that the written reports could not constitute "substantial evidence" because none of the physicians were cross-examined and because the only live testimony presented at the hearing contradicted the written reports and supported his claim. This Court rejected the argument, highlighting "a number of factors that, we feel, assure [the] underlying reliability and probative value" of the challenged expert evidence. *Id.* at 402. Two of those considerations have particular relevance here.

First, the Court emphasized the robust evidentiary foundation for the expert reports. The Court explained "[t]he particular reports of the physicians who examined claimant Perales were based on personal consultation and personal examination and rested on accepted medical procedure." *Id.* at 403. The reports reflected an "impressive range of examination" by experts in different specialties, including "a patient and careful endeavor by the state agency and the examiner to ascertain the truth." *Id.* at 404. In the reports, the experts carefully detailed their examinations, providing not only their bottom-line conclusions on disability but also the results of specific tests they performed to reach those results. *Id.* at 403-04. The medical reports in *Perales* thus afforded the hearing examiner, and the reviewing courts, the opportunity to evaluate whether the doctors' diagnoses logically flowed from the examinations upon which they were based. Buttressing

the Court's confidence in the reports' conclusions was the lack of any "inconsistency whatsoever in the reports," despite the fact that "each result was reached by independent examination in the writer's field of specialized training." *Id.* at 404.

Second, in assessing whether "substantial evidence" supported the ALJ's finding, the Court found salient that the applicant had failed to avail himself of procedures for testing the "reliability and probative value" of expert evidence in disability hearings. *Id.* at 402. The Court noted that although the applicant complained of not being able to "cross-examine the reporting physicians" whose written reports contributed to the ALJ's adverse determination, the applicant had failed to take advantage of the procedure that would have afforded him that very opportunity: asking the ALJ to issue subpoenas for the appearance and testimony of the physicians. *Id.* at 404-05; 20 C.F.R. § 404.950(d).[4] Because the physicians were subject to subpoena and cross-examination, relying on their reports did not diminish the "integrity" or "fairness" of the hearing. And because the applicant did not pursue his opportunity to subpoena and cross-examine the witnesses, the applicant could not "complain[] that he was denied the rights of confrontation and cross-examination." *Perales*, 402 U.S. at 405; *see also id.* at 402.

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[4] At the time that *Perales* was decided, 20 C.F.R. § 404.926 allowed ALJs and members of the Appeals Council to issue subpoenas on their own initiative or on request of either party. That regulation was moved in 1980 to 20 C.F.R. § 404.950(d), but its substance remains the same.

Perales thus demonstrates the contours of "substantial evidence" in social security proceedings. Expert testimony cannot be "substantial evidence" if there is no viable means of verifying whether the testimony is reliable. That verification is best facilitated by making the underlying data available to the applicant and permitting the applicant to test the data and conclusions drawn from the data through cross-examination. But *Perales* also recognizes that an applicant may acquiesce to the reliability of expert testimony by declining to challenge reliability in agency proceedings. What *Perales* does not permit, however, is deeming expert testimony "substantial evidence" when there is no means of verifying the evidence upon which the testimony is based, and an applicant does not acquiesce to the reliability of the testimony. Yet that is precisely what the Sixth Circuit countenanced below.

2. Under *Perales*, the testimony of a vocational expert cannot constitute substantial evidence when an expert withholds the data upon which the testimony is based.

The Sixth Circuit's approach conflicts with *Perales* in two important ways. *First*, a court cannot test the factual predicates for an expert's conclusions when the expert withholds the underlying data. In the opinion below, the Sixth Circuit found substantial evidence of the number of jobs available to Petitioner (including the vocational expert's subsequent reduction of those numbers "by about 20 to 30 percent" in response to a hypothetical question by the ALJ) based solely upon the say-so of the vocational expert. Pet. App. 117a. The

expert purported to rely in part on her "individual labor market surveys," but she refused to provide these sources. Pet. App. 119a. As a result, neither Petitioner nor the ALJ could determine whether the expert's underlying data were "such ... as a reasonable mind might accept as adequate to support [the expert's] conclusion." *Perales*, 402 U.S. at 401 (internal quotation marks omitted). The reliability of the vocational expert's conclusions was therefore unknowable, in contrast to the medical reports in *Perales*, which had substantial and articulable support. As such, the ALJ's conclusion regarding other work available to Petitioner was based on little more than "uncorroborated hearsay." *Consolidated Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 230 (1938); *see also Chavez v. Berryhill*, 895 F.3d 962, 969 (7th Cir. 2018) ("What is entirely lacking is any testimony from the VE explaining why he had a reasonable degree of confidence in his estimates.... The absence of any such testimony left the ALJ without any reasoned and principled basis for accepting the job-number estimates."); *Barrett v. Barnhart*, 355 F.3d 1065, 1067 (7th Cir. 2004) ("For [the vocational expert] to offer the number 24,500 with no indication of how he adjusted the numbers in the dictionary to reflect Barrett's diminished capacity leaves us in the dark about the actual basis of his testimony."). Without underlying data, applicants "have little to no meaningful opportunity to challenge the methodological or empirical reliability of vocational expert testimony." Carolyn A. Kubitschek & Jon C. Dubin, *Social Security Disability: Law & Procedure in Federal Court* § 3:106, Westlaw (Apr. 2018 Update).

For much the same reason, permitting a vocational expert to withhold underlying data renders it impossible to assess whether the vocational expert's conclusions regarding jobs numbers are even consistent with the very sources upon which the expert claims to rely. By denying an applicant access to the data source or sources upon which a vocational expert has relied, an ALJ insulates the expert's testimony from any analysis of internal inconsistencies. Indeed, here the vocational expert identified *two* sources of data upon which her analysis was based—"the *Bureau of Labor Statistics* as well as [her] own individual labor market surveys." Pet. App. 119a. If the various sources relied upon by the vocational expert conflict, the expert's testimony alone cannot constitute substantial evidence. *See Perales*, 402 U.S. at 404. Yet by preventing any evaluation of what an expert's data actually reveal, the Sixth Circuit's decision countenances exactly this result.

Second, unlike the applicant in *Perales*, Petitioner specifically sought to avail himself of the mechanism open to him for effectively probing the expert's conclusion: requesting the underlying data during cross-examination. *See* Pet. App. 20a. Although Petitioner's counsel had the opportunity to question the vocational expert, without the data upon which the expert's testimony rested, he could not test whether the vocational expert's conclusions were based on anything more than the "suspicion of the existence of the fact to be established." *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). Lack of the requested data did not merely hamper Petitioner at cross-examination; it also meant the ALJ reached a conclusion based solely on the say-so of the expert

without even reference to, let alone analysis of, the "labor market studies" the expert claimed as part of the basis for her conclusions. *Perales* requires the opposite result when an applicant takes advantage of the available mechanisms for testing an expert's reliability.

3. Requiring vocational experts to provide upon request the data underlying their testimony satisfies the indicia of reliability identified in *Perales*.

Requiring a vocational expert to provide underlying data upon request vindicates this Court's holding in *Perales*. Recognizing that "an ALJ's findings must be supported by substantial evidence," the Seventh Circuit has noted "an ALJ may depend upon expert testimony only if the testimony is reliable." *McKinnie v. Barnhart*, 368 F.3d 907, 910 (7th Cir. 2004) (per curiam). Thus, when an applicant seeks to understand the basis for a vocational expert's conclusions regarding "other work," the applicant can cross-examine the expert—"an approach deemed adequate in *Richardson v. Perales*." *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002). While a vocational expert is "'free to give a bottom line,'" during this examination, "the data and reasoning underlying that bottom line must be 'available on demand' if the applicant challenges the foundation of the vocational expert's opinions." *McKinnie*, 368 F.3d at 911 (quoting *Donahue*, 279 F.3d at 446).

Thus, in *McKinnie*, an expert provided estimates for the number of jobs available to the applicant in the regional economy, but "did not substantiate her findings with a written report or other documentation to substantiate her figures," and provided "vague

responses to McKinnie's questioning." *Id.* As a result, the court found the agency had failed to establish by substantial evidence "the existence of a significant number of jobs that the claimant can perform." *Id.*

Yet—again like *Perales*—"[w]hen no one questions the vocational expert's foundation or reasoning, an ALJ is entitled to accept the vocational expert's conclusion." *Donahue*, 279 F.3d at 446. Thus, in *Barrett v. Barnhart*, 355 F.3d 1065 (7th Cir. 2004), although the court was left "in the dark" as to the basis for the expert's conclusion regarding the number of jobs available to the applicant, any objection was "forfeited" because the applicant's lawyer "did not question the basis for the vocational expert's testimony, purely conclusory though that testimony was." 355 F.3d at 1067.

Requiring the production of underlying data upon request thus combines the requirement that an ALJ's conclusion be based on substantial evidence, not mere say-so, with *Perales*'s instruction that an applicant cannot attack the substantiality of an expert's conclusions when the applicant fails before the agency to take advantage of the procedural mechanisms available for probing those conclusions. *See Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017) ("[W]hen a claimant fails entirely to challenge a vocational expert's job numbers during administrative proceedings before the agency, the claimant forfeits such a challenge on appeal, at least when that claimant is represented by counsel."). This rule achieves precisely the balance between procedures that are "liberal and not strict in tone" and yet "fundamentally fair," that this Court recognized as

the "obvious intent of Congress" in the Social Security Act. *Perales*, 402 U.S. at 400-01.

B. This Court's Rulings In Other Administrative Contexts Confirm That "Substantial Evidence" Requires Experts To Provide Upon Request The Data Underlying Their Testimony.

In elucidating the contours of the "substantial evidence" standard, *Perales* cited to this Court's interpretation of that phrase in a variety of regulatory contexts. *See Perales*, 402 U.S. at 401 (citing *Consolidated Edison Co.*, 305 U.S. 197, and *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), applying the National Labor Relations Act, and *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966), applying the Administrative Procedure Act). As this Court has recognized, "[t]he statutory phrase 'substantial evidence' is a 'term of art' in administrative law that describes how an administrative record is to be judged by a reviewing court." *T-Mobile S., L.L.C. v. City of Roswell*, 135 S. Ct. 808, 815 (2015) (quoting *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963)). When interpreting the term "substantial evidence" in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, the Court found "no reason discernable from the text of the Act to think that Congress meant to use the phrase in a different way" than in other provisions setting the standards for judicial review of agency action. *T-Mobile S.*, 135 S. Ct. at 815. The same is true here. Congress intended "substantial evidence" in the Social Security Act to provide the same substantive and procedural protections during judicial

review that exist in other agency contexts. H.R. Rep. No. 76-728, at 43; S. Rep. No. 76-734, at 52; *see also* H.R. Rep. No. 94-679, at 2-3. This Court thus can and should look to analogous administrative contexts where an agency's findings must be supported by substantial evidence to survive judicial review.

Of greatest relevance here, this Court has urged special caution when finding "substantial evidence" based on expert testimony. In *Baltimore & Ohio Railroad Co. v. Aberdeen & Rockfish Railroad Co.* ("*Baltimore & O. R.R. Co.*"), 393 U.S. 87 (1968), this Court held that the Interstate Commerce Commission's allocation of revenue between Southern and Northern rail lines was not supported by substantial evidence. Specifically, the Court faulted the Commission for using the Northern rail lines' blended average costs as a basis for allocating revenues when 80% of the Northern rail lines' traffic was solely within the North, and it was "difficult to maintain that these intraterritorial Northern costs are the same or approximately the same as the Northern costs in handling traffic between North and South." *Id.* at 90. Crediting the Board's use of the average costs, this Court found, "would in effect be saying that the expertise of the Commission is so great that when it says average territorial costs fairly represent the costs of North-South traffic, the controversy is at an end, even though the record does not reveal what the nature of that North-South traffic is." *Id.* at 91-92. Acceptance of this characterization of the facts, this Court found, would render the requirement that the Commission's actions be "based on substantial evidence ... lost in the haze of so-called expertise." *Id.* at 92.

The very same danger exists here. While "[p]recision and exactitude in the mathematical sense" may not be possible in a vocational expert's estimate of various job categories in the national economy, that is a far cry from saying that the agency can satisfy its burden of demonstrating other work on the testimony of the expert alone. *Id.* Accepting the expert's testimony in this regard—*particularly* when challenged by the applicant—would, like *Baltimore & O. R.R. Co.*, improperly assume administrative expertise at the cost of actual evidence. *See also Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (recognizing that, in defining substantial evidence review, "the Court has stressed the importance of not simply rubber-stamping agency factfinding").

In other administrative contexts, this Court has noted that substantial evidence "afford[s] a substantial basis of fact from which the fact in issue can be reasonably inferred." *Columbian Enameling & Stamping Co.*, 306 U.S. at 299. Thus, in *Columbian Enameling*, the Court held that substantial evidence did not support the National Labor Relations Board's conclusion that an employer had improperly refused to bargain collectively with its employees. In finding the Board's conclusion not adequately supported, the Court noted a crucial fact was missing from the Board's record. Although the deficiency was "pointedly bought to the attention of the Board . . . no attempt was made to supply the omission." *Id.* at 298. As a result, the Board's decision on this significant point rested on a "matter of conjecture" that the Court deemed insufficient to satisfy the substantial evidence standard. *Id.* at 299, 300.

As seen in the opinion below, permitting reliance on expert testimony despite the applicant's request for underlying data countenances almost precisely the error this Court identified in *Columbian Enameling*. The Sixth Circuit recognized that Petitioner requested the data underlying the expert's opinion and argued that "little substantiates the reliability of the vocational expert's testimony other than her word," such that it "falls short of 'substantial evidence.'" Pet. App. 20a. Yet despite having pointed out to the agency an "omission" in the record that constrained the agency to rely on the expert's "conjecture" alone rather than substantial evidence, the Sixth Circuit nonetheless affirmed the agency's finding. *Columbian Enameling* requires otherwise. *Columbian Enameling*, 306 U.S. at 299-300.

Equally elucidating is the rare case in which this Court *has* found an agency's decision supported by substantial evidence when the decision was based on expert testimony alone. In *Federal Power Commission v. Florida Power & Light Co.* ("*FP&L*"), 404 U.S. 453, 462-463 (1972), this Court reversed the Fifth Circuit and held the Federal Power Commission had jurisdiction over the respondent because the respondent was engaged in the transmission of electric energy in interstate commerce. The Court noted that the Commission had accepted the testimony of an expert regarding the transmission of power, even though "[t]he elusive nature of electrons renders experimental evidence that might draw the fine distinctions required by this case practically unobtainable." *Id.* at 466-67. Nonetheless, the expert's testimony was "probed, and in our opinion not undercut, by the hearing examiner's questions . . . [and] cross-examination." *Id.* at 463 Thus,

the Court held, "well-reasoned expert testimony—based on what is known and uncontradicted by empirical evidence—may in and of itself be 'substantial evidence' when first-hand evidence on the question (in this case how electricity moves within a bus) is unavailable." *Id.* at 464-65. *FP&L* is instructive because it demonstrates the type of situation—when actual evidence simply does not exist but well-reasoned expert testimony is uncontradicted—in which substantial evidence can be found based on an expert's (or multiple experts') testimony alone.

This is vastly different from the case here, in which an expert makes a statement, acknowledges under questioning that the statement *is* based on first-hand evidence in the expert's possession, but then refuses to share that evidence. *FP&L* declined to require an expert to conduct the type of studies that, "if they are feasible at all—would take one or two years to conduct," in order for the agency to rely upon the expert's testimony. *Id.* at 467-68. But that is entirely different than requiring an expert to produce upon request a study the expert *already* conducted and upon which they explicitly base their testimony. *Id.*

II. FINDING AN EXPERT'S TESTIMONY, ALONE, TO BE SUBSTANTIAL EVIDENCE IGNORES THE REQUIREMENT THAT TESTMIONY BE RELIABLE, AND CONFLATES THE CREDIBILITY OF AN EXPERT WITH THE RELIABILITY OF THE EXPERT'S EVIDENCE.

Courts, like the Sixth Circuit, that consider a vocational expert's say-so to be substantial evidence, notwithstanding a challenge from the applicant, have done so for three misguided reasons.

First, these courts note that "[e]vidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure." 42 U.S.C. § 405(b)(1). They then conclude that requiring vocational experts to provide upon request the data underlying their testimony would violate § 405(b)(1) by "effectively import[ing] a key provision of the Federal Rules of Evidence into Social Security proceedings." Pet. App. 21a. These courts likewise criticize the Seventh Circuit for "acknowledg[ing] . . . that ALJs are not bound by the Rules of Evidence, but then turn[ing] around and requir[ing] ALJs to hew so closely to *Daubert's* principles." *Brault*, 683 F.3d at 449; *Purdy v. Berryhill*, 887 F.3d 7, 16 (1st Cir. 2018); *Welsh v. Comm'r Soc. Sec.*, 662 F. App'x 105, 109 (3d Cir. 2016). But as seen in the Seventh Circuit, requiring the production of underlying data does not apply a *Daubert*-like standard that would determine whether a vocational expert's testimony is admissible in the first place. Vocational

experts in the Seventh Circuit can and do testify without any *Daubert*-like gatekeeping procedure to assess their qualifications. Moreover, hearings within the Seventh Circuit are not constrained by the myriad procedural and substantive rules applicable to experts in civil litigation.

Second, courts that reject the Seventh Circuit's approach ignore that in choosing not to apply the Federal Rules of Evidence to social security proceedings, Congress did not jettison the common-law rule that an expert's testimony must be reliable. That common law requirement has always governed a decision-maker's acceptance of expert testimony, including in the administrative context. Access to the data underlying an expert's testimony, if requested, is a critical means of ensuring this reliability.

Third, the Sixth Circuit and the courts that agree with it conflate reliability and credibility. In rejecting the Seventh Circuit's approach, the Sixth Circuit noted that ALJs "carefully weigh the credibility of witnesses who testify," and thus their "acceptance of [that] testimony cannot be said to have been improper." Pet. App. 22a (quoting *Sias v. Sec'y of Health & Human Servs.*, 861 F.2d 475, 481 (6th Cir. 1988)). But the "credibility" of a vocational expert is a red herring. An expert may be credible in the sense that the expert has no bias, is truthful, and demonstrates sufficient experience and education. But those attributes have little bearing on whether an expert's testimony regarding a specific number of jobs, in a specific region, at a specific time, is reliable. *That* inquiry does not concern an expert's credibility, but turns instead on the

accuracy of the underlying data and the rationality and rigor of the analysis. Reliability and credibility are simply not the same thing. While an expert's general credibility is important, it does not demonstrate that specific conclusions are reliable and supply the requisite "substantial evidence" to give a factual finding conclusive effect on judicial review. *See, e.g.*, Pet. App. 22a ("[I]t is undoubtedly true that vocational expert testimony that is 'conjured out of whole cloth' cannot be considered substantial evidence."); *Brault*, 683 F.3d at 450 ("[W]e agree with the Seventh Circuit that evidence cannot be substantial if it is 'conjured out of whole cloth.'" (internal citation omitted)).

A. Requiring vocational experts to provide upon request the data underlying their conclusions does not import the Federal Rules of Evidence into social security hearings.

It is undisputed that "strict rules of evidence, applicable in the courtroom, are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent." *Perales*, 402 U.S. at 400; 42 U.S.C. § 405(b)(1). But the Second and Sixth Circuits are simply wrong when they claim the Seventh Circuit's approach "acknowledge[d] in *Donahue* that ALJs are not bound by the Rules of Evidence, but then ... require[d] ALJs to hew so closely to [them]." Pet. App. 21a (quoting *Brault*, 683 F.3d at 449). A brief comparison of the requirements of the federal rules that govern the testimony of experts in courtrooms with the rules governing the testimony of vocational experts within the Seventh Circuit makes this point clear.

Once an expert has satisfied the various disclosure requirements laid out in Rule 26 of the Federal Rules of Civil Procedure—none of which of course apply here—an expert's proffered testimony is next subjected to various tests imposed by the Federal Rules of Evidence and this Court's interpretations of those rules. Specifically, *Daubert* and *Kumho Tire* require the trial court to play "a gatekeeping role" for expert testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141-42 (1999). The trial court measures the expert's proffered testimony against Rule 702 to "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597. If the expert clears that hurdle, the expert may testify at trial. If an expert does not clear the *Daubert* hurdle, evidence from that expert is inadmissible at trial. *See, e.g., In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 858 F.3d 787, 797 (3d Cir. 2017) ("[A]ny step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible." (internal quotation marks omitted)). Even if an expert surmounts *Daubert*, any testimony received at trial is subject to various limitations set forth in the Federal Rules of Evidence and can be attacked through "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof," aided by voluminous pretrial disclosures. *Daubert*, 509 U.S. at 595-96.

As seen in the Seventh Circuit, requiring underlying data from vocational experts upon request imports none of these requirements. The Seventh Circuit has

expressly recognized that "Rule 702 does not apply to disability adjudications," which it properly characterizes as "a hybrid between the adversarial and the inquisitorial models." *Donahue*, 279 F.3d at 446 (citing *Perales*, 402 U.S. 389). Thus, unlike under *Daubert* and Rule 702, there is no preliminary hearing prior to a vocational expert's testimony, let alone a requirement that an expert produce a report or summary in advance of testifying that details the expert's experience, compensation, conclusions, and factual support. Moreover, vocational experts testifying in social security disability hearings within the Seventh Circuit are subject to none of the requirements of the Federal Rules of Evidence. And social security proceedings in the Seventh Circuit are unburdened by the requirements of the Federal Rules of Evidence in myriad ways, from reliance on hearsay testimony, *see Perales*, 402 U.S. at 402 (permitting reliance on hearsay written reports); *Binion ex rel. Binion v. Chater*, 108 F.3d 780, 788 n.5 (7th Cir. 1997), to an ALJ's consideration of evidence from outside the record, *see Adkins v. Astrue*, 226 F. App'x 600, 606-07 (7th Cir. 2007) (rejecting claimant's argument that ALJ violated Federal Rules of Evidence when considering medical reference text outside of the record).

It is thus no surprise that in the sixteen years since *Donahue*, social security hearings within the Seventh Circuit have *not* turned into mini-trials. They have instead retained all of the efficiency and informality Congress envisioned. Under the Seventh Circuit's approach, the vocational expert need only make the data underlying the expert's testimony "available on demand

to facilitate cross-examination and testing of the VE's reliability." *Britton v. Astrue*, 521 F.3d 799, 804 (7th Cir. 2008). This approach does not "endorse a system that drags out every Social Security hearing to an interminable length." *Id.* Instead, it requires the expert to provide the data only if asked to do so and only at the hearing itself. Moreover, ALJs are careful to require vocational experts to provide only the precise data upon which they rely, and nothing more. *See id.* at 802, 804. And the Seventh Circuit has ensured that its rules do not render every proceeding "impossibly long." *Id.* It has achieved this result by suggesting that applicants will question the expert about the data at the same hearing where the expert supplies it, perhaps with the benefit of a "brief recess[]" as necessary for review. *Id.* The Seventh Circuit's standard does not entitle the applicant to prehearing disclosures, nor does it obligate the ALJ to schedule supplemental proceedings. It simply requires that the vocational expert come to the hearing prepared to furnish and discuss the foundation for his or her conclusions and that the applicant or applicant's representative be given the opportunity to meaningfully inquire into the validity of the data and their connection to the expert's conclusions.

Lower courts have applied this straightforward rule without upsetting the balance it strikes. In cases where ALJs do not enforce the rule, lower courts reverse and remand. *See, e.g.*, *Powell v. Colvin*, No. 1:13-CV-51, 2014 WL 1643313, at *14-15 (N.D. Ind. Apr. 22, 2014); *Reynolds v. Astrue*, No. 09-C-0537, 2010 WL 2900356, at *4 (E.D. Wis. July 21, 2010). But courts have likewise recognized the rule's limitations and rejected arguments

that seek to broaden its application. *See, e.g., Khuzaie v. Comm'r of Soc. Sec.*, No. 1:14-CV-00199-SLC, 2016 WL 1253537, at *15 (N.D. Ind. Mar. 30, 2016) (rejecting argument that expert was required to provide data where applicant failed to request it); *Ronning v. Colvin*, No. 13 CV 8194, 2015 WL 1912157, at *9 (N.D. Ill. Apr. 27, 2015) (rejecting argument that expert failed to support her testimony where she identified specific sources of data, explained her methodology, and was able on cross-examination to reconcile and explain differences between figures).

This real-world experience belies the notion that the Seventh Circuit has imported the Federal Rules of Evidence or *Daubert* into social security proceedings. The Seventh Circuit's rule "increases the . . . reliability of the evaluation process" without compromising efficiency. *Bowen v. Yuckert*, 482 U.S. 137, 153 (1987). That is exactly what procedural mechanisms within the Social Security context should achieve. *Id.*

B. Expert testimony in administrative proceedings must be reliable, and this Court has recognised that reliability is best assured through cross-examination of the data and methodology resulting in the expert's conclusions.

The courts that do not require a vocational expert's underlying data upon request err in another important way. Even though the Federal Rules of Evidence do not apply in social security hearings, vocational expert testimony must still be reliable in order for an ALJ's reliance on that testimony to constitute substantial

evidence. This requirement of expert reliability has long existed in administrative law, and derives from common law principles that continue to animate judicial review of expert testimony. Reliability cannot be vindicated effectively without meaningful cross-examination of the expert, which in turn requires the expert to supply the foundation for his or her testimony if the applicant requests it.

In *Perales* this Court's inquiry into whether the medical reports could constitute "substantial evidence" focused on the reports' "underlying reliability." *Perales*, 402 U.S. at 402. As discussed above, the Court examined numerous aspects of the reports' content and the procedures available to the applicants to challenge them. *See* Part I.A.1, *supra*. The Court also examined more broadly the various contexts in which this form of expert testimony had been deemed reliable. *See Perales*, 402 U.S. at 403-04 (noting that written medical reports had been deemed reliable in civil litigation and judicial review of social security hearings). Likewise, in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989), the Court emphasized—while reviewing an agency's decision to ensure, *inter alia*, that it was based upon substantial evidence, *see id.* 375 n.21—that while "an agency must have discretion to rely on the reasonable opinions of its own qualified experts ... courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance" of the information in the record, *id.*

at 378. *Marsh*, again, emphasizes that part and parcel of the substantial evidence inquiry is an examination of whether an expert's testimony is sufficiently reliable to be accepted.

Following this Court's lead, the courts of appeals have stressed the importance of reliability when assessing an agency's use of expert evidence in administrative proceedings. For example, in *United States Steel Mining Co. v. Director, Office of Workers' Compensation Programs*, 187 F.3d 384, 386 (4th Cir. 1999), the Fourth Circuit reversed the Department of Labor's determination that an individual qualified for survivors' benefits under the Black Lung Benefits Act. In reviewing the evidence relied upon by the agency, the court explained "in an agency proceeding the gate keeping function to evaluate evidence occurs when the evidence is considered in decision[-]making rather than when the evidence is admitted." *Id.* at 389. But this evaluation must nonetheless occur because "[a]bsent such a discipline to qualify evidence, administrative findings and orders could unacceptably rest on suspicions, surmise, and speculation." *Id.* Setting aside the speculative opinion of an expert, "the ALJ was without *any* evidence upon which to base a finding," and the court deemed the agency's determination unsupported by substantial evidence. *Id.* at 391; *see also Britton*, 521 F.3d at 803 ("A finding based on unreliable VE testimony is equivalent to a finding that is not supported by substantial evidence and must be vacated.").

That courts require agencies to rely upon reliable experts—even absent the application of the Federal

Rules of Evidence—is no surprise in light of the "common law['s] insistence upon 'the most reliable sources of information.'" *Daubert*, 509 U.S. at 592 (quoting Advisory Committee's Notes on Fed. Rule Evid. 602, 28 U.S.C. App., p. 755); *see also* 1 *McCormick On Evidence* § 10 (Kenneth S. Broun ed., 7th ed. 2013) (noting the common law is "exacting in its insistence on the most reliable sources of information"); *see* Albert S. Osborn, *Reasons and Reasoning in Expert Testimony*, 2 *L. & Contemp. Problems* 488, 488 (1935) (noting that "expert testimony that [is] not susceptible of illustration and explanation so as to be weighed by the ordinary hearer . . . is the class of testimony that can be rendered almost valueless in case of conflict and in many instances deserves the severest criticism. A bare opinion is a dangerous basis for a verdict"). Indeed, treatises dating back to 1777 recognized, "the first, therefore, and most signal Rule in Relation to Evidence, is this, That a Man must have the utmost Evidence, the nature of the Fact is capable of: For the Design of the Law is come to legal Demonstration in Matters of Right, and there can be no Demonstration of a Fact without the best Evidence that the Nature of the Thing is capable of." Geoffrey Gilbert, *The Law of Evidence* at 4 (4th ed. 1777). Rule 702 "relax[e]d the traditional barriers to 'opinion' testimony" at common law. *Daubert*, 509 U.S. at 588 (internal quotation marks omitted). But nothing in Rule 702, or this Court's decisions regarding the use of experts in either civil litigation or administrative proceedings, suggests that reliability is no longer the touchstone when determining whether expert testimony should be relied upon in establishing a fact upon which a decision-maker relies.

The ability to conduct probing cross-examination of an expert has long been understood by this Court as a critical means of assuring that an expert's testimony is, in fact, reliable. *See id.* at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *Perales*, 402 U.S. at 410 (recognizing that "cross-examination as may be required for a full and true disclosure of the facts" is integral to the "integrity and fundamental fairness" of proceedings"); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 320 (2009) ("Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination."); *see also* Stephan Landsman, *Of Witches, Madmen, and Products Liability: An Historical Survey of the Use of Expert Testimony*, 13 Behav. Sci. & L. 131, 139-40 (1995) (noting that in the 1800s, the advent of "[l]awyer cross-examination exposed weaknesses and uncertainties that had been previously unexplored [in expert testimony]").

Rejecting an applicant's request for access to the data that vocational experts *identify* as the basis for their testimony renders cross-examination effectively meaningless. "The age-old tool for ferreting out truth in the trial process is the right to cross-examination," which remains a hallmark for "testing the facts offered by the defendant on direct." *Perry v. Leeke*, 488 U.S. 272, 283 n.7 (1989) (internal quotation marks omitted). And as several courts have recognized, "it is important to the proper cross-examination of an expert witness that the adverse party be aware of the facts underlying

the expert's opinions, including whether the expert made an independent evaluation of those facts, or whether he instead adopted the opinions of the lawyers that retained him." *Elm Grove Coal Co. v. Dir., Office of Workers' Comp. Programs*, 480 F.3d 278, 301 (4th Cir. 2007). With no access to underlying data, an applicant cannot probe the basic question—fundamental to assessing an expert's reliability—of whether the expert's conclusions flow from a coherent analysis of reliable data sources. In turn, an ALJ who finds "other work" available to an applicant on that testimony alone has little means of assuring that the expert's testimony reliably supports that finding.

This problem is hardly theoretical. An undisclosed "confidential labor market survey," such as that cited by the vocational expert here, permits no verification that an individual allegedly placed at a job had the same limitations as the hypothetical individual described by the ALJ. In situations where an applicant's specific or unique limitations may be the exact reason why a certain job is in fact not viable, an ALJ's acceptance of undisclosed data on this critical fact may result in exactly the unreliable conclusion the substantial evidence standard is intended to protect against.

Likewise, particular employers may have unique or atypical jobs that do not more broadly represent the opportunities available within *DOT*-defined job categories. The fact that one employer, in one location, at one time, may have employed an individual with a set of limitations—or that in an unverified time period a particular job could be performed notwithstanding certain limitations—provides almost no means of

verifying that jobs currently available to an applicant exist in various regions in the country or within the national economy. And, even if an employer hired an individual with certain limitations, that single data point, alone, does not demonstrate that the individual was able to keep the job past an initial probationary or training period. Vocational expert testimony based on undisclosed private surveys cannot fulfill the government's burden in this regard.

Indeed, the problem is more acute still. In a situation like Petitioner's, not only is the applicant denied a means of showing (if it is the case) that the expert's conclusions are not supported by the underlying evidence, but an ALJ's perception of the reliability of an expert's testimony could well be *enhanced* because of the expert's citation to sources the expert nonetheless withholds. *See, e.g., United States v. Downing*, 753 F.2d 1224, 1239 (3d Cir. 1985) (recognizing that "[t]he danger that scientific evidence will mislead the [factfinder] might be greater, for example, where the [factfinder] is not presented with the data on which the expert relies, but must instead accept the expert's assertions as to the accuracy of his conclusions"); *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979) (describing a common concern among courts that technical expert testimony poses "substantial danger of undue prejudice and confusion because of its aura of special reliability and trustworthiness"). Even the Sixth Circuit recognizes that vocational experts cannot conjure their opinions out of whole cloth. But ALJs and reviewing courts have no way to eliminate that very possibility when an expert withholds the foundation for his or her testimony.

The agency's suggestion that an applicant might "tender his own evidence . . . [or] submit evidence that contradicted [the vocational expert's] estimates," is no solution to this problem. BIO 13. For one, it is the *agency's* burden to show the existence of other work by substantial evidence. The burden of proof shifts to the agency at step five "in express recognition of the manifest unfairness of requiring disabled, unemployed, mostly lower income applicants to prove a broad negative proposition about the absence of suitable alternative work in the labor market." *Overcoming Gridlock*, 62 Admin. L. Rev. at 964. Indeed, "[t]hat even the agency has openly acknowledged these fairness considerations in its burden of proof regulations further counsels against re[-]shifting this burden back to applicants." *Id.* (footnote omitted).

In addition, even were predominantly *pro se* applicants[5] able to surmount the substantial costs and practical difficulties in hiring their own vocational experts, a battle of experts is precisely the *opposite* of the efficient, cost-effective, and informal administrative scheme that Congress envisioned. The Seventh Circuit's rule eliminates the need for inefficient and

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[5] "[A] large portion of Social Security claimants either have no representation at all or are represented by non-attorneys." *Sims v. Apfel*, 530 U.S. 103, 112 (2000). *See* Soc. Sec. Advisory Board, *Filing for Social Security Benefits: What Impact Does Professional Representation Have on the Process at the Initial Application Level?*, 23, figure 4 (Sept. 2012) (aggregating data from the agency to find that only 14% of SSDI applicants and 4.5% of SSI applicants had representation at the initial application stage), https://legalaidresearch.org/wp-content/uploads/ssab-social-security-disability-representation-2012.pdf.

costly battles between experts in social security hearings. It would make little sense to insist upon exactly this as an applicant's only means of testing the reliability of the government's vocational expert.

C. A vocational expert's experience and credibility do not assure reliable conclusions.

In affirming the agency's decision, the Sixth Circuit found the ALJ had properly "weigh[ed] the credibility" of the vocational expert. Pet. App. 22a. And in defending the Sixth Circuit's decision, the agency repeatedly asserts that the ALJ was permitted to credit the vocational expert's testimony regarding the number of jobs available in Southeast Michigan between 2009 and 2013 based solely on the vocational expert's "11 years of professional experience as a vocational rehabilitation consultant." BIO 8; *see also id.* 12 ("[P]rofessional experience may constitute a valid basis for a vocational expert's testimony in a Social Security disability benefits hearing, where formal evidentiary rules do not apply at all."). But an expert's credibility and experience are no substitute for a meaningful inquiry into whether the specific fact-based conclusions the expert proffers are reliable.

In challenging the vocational expert's testimony and seeking access to the data upon which it was based, Petitioner sought to test the rationality and reliability of the expert's conclusions that jobs were available to him. Specifically, the expert provided estimates of various jobs available to Petitioner based on hypotheticals posed by the ALJ regarding Petitioner's limitations. Thus, the expert testified that if Petitioner were able to work at

the light exertional level, *see* 20 C.F.R. § 404.1567(b), he could take a job as a "bench assembler" with "6,000 jobs in Southeast Michigan." Pet. App. 116a. Next, the expert testified that if Petitioner could only perform work at the sedentary level, *see* 20 C.F.R. § 404.1567(a), he could still work as a bench assembler with "3,000 jobs in Southeast Michigan." Pet. App. 116a. She then testified that for under the sedentary exertion level the jobs numbers would need to be reduced further by "about 20 to 30 percent." Pet. App. 117a. In support of these numbers—meant to reflect the jobs market between October 2008 and May 2013—the expert said she was relying upon data from "the *Bureau of Labor Statistics* as well as [her] own individual labor market surveys." Pet. App. 119a.

The expert's testimony—the sole source for the ALJ's finding by "substantial evidence" of "other work" available to Petitioner in the regional economy—thus referenced specific jobs, at a specific time, in a specific place. To be sure, the expert's general experience may have aided her conclusion, and her credibility was a necessary condition for the ALJ's reliance upon her testimony. But, more critically, the expert's testimony required looking at data sources and drawing conclusions from those sources. And as the Seventh Circuit has recognized, it is the job of the ALJ to "hold the VE to account for the reliability of his job-number estimates." *Chavez*, 895 F.3d at 970. Job markets are dynamic, and the existence of certain jobs—and the qualifications required for them—may change over time. *Browning v. Colvin*, 766 F.3d 702, 709 (7th Cir. 2014) ("No doubt many of the jobs [in the DOT] have changed

and some have disappeared. We have no idea how vocational experts and administrative law judges deal with this problem.").

When an expert claims a specific evidentiary foundation for his or her testimony, and then withholds that foundation when asked to provide it, the expert's general experience and credibility are not sufficient to ensure the reliability that "substantial evidence" requires. Experience and credibility are important, but they provide no means for the applicant to test—and the ALJ to assess—whether the expert's data source is incomplete or unrepresentative, or the expert's methodology flawed. *See, e.g.*, *Andreu ex rel. Andreu v. Sec'y of Dep't of Health & Human Servs.*, 569 F.3d 1367, 1379 (Fed. Cir. 2009) ("A trial court makes a credibility determination in order to assess the candor of a fact witness, not to evaluate whether an expert witness' medical theory is supported by the weight of epidemiological evidence."); *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183, 1201 (11th Cir. 2010) ("Merely demonstrating that an expert has experience . . . does not automatically render every opinion and statement by that expert reliable.").[6] Again, particularly when an expert acknowledges that a

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[6] Lower courts in the Seventh Circuit have applied exactly this reasoning in the context of vocational expert testimony. *See Holtz v. Astrue*, No. 07-C-314-C, 2007 WL 5323758, at *5 (W.D. Wis. Nov. 8, 2007) ("What Harris failed to explain, however, was the method she employed in making this reduction. All she cited was her experience, but that experience does not explain her math. She did not cite any formal market surveys that she or other vocational experts had done or even describe any informal method she employed to extrapolate her estimates from the state job data.").

conclusion rests on data, provision of that data to the opposing party is the best means of assessing the conclusion's reliability and worth.

III. REQUIRING VOCATIONAL EXPERTS TO PROVIDE ON REQUEST THE DATA UNDERLYING THEIR TESTIMONY IS CONSISTENT WITH THE AGENCY'S OWN POLICIES AND WITH COMMON SENSE.

In opposing certiorari, the agency argued that the problem identified by Petitioner might be of "limited prospective importance." BIO 18. In support of this claim, the agency cited the 2017 update to its *Vocational Expert Handbook*, which advises vocational experts that they "should be able to thoroughly explain what resource materials [they] used and how [they] arrived at [their] opinions." BIO 18 (citing *Vocational Expert Handbook* at 37). But the *Vocational Expert Handbook* is no solution. Most principally, it does not instruct vocational experts to provide on request the data on which they rely. And in any event the *Vocational Expert Handbook* is advisory, not mandatory. Given that the issue presented in this case only arises when an expert refuses to voluntarily provide data, advisory guidance furnishes little assistance.

That said, the *Vocational Expert Handbook* is significant in one important respect: It demonstrates the agency's acknowledgment that it is important for ALJs to evaluate the data underlying conclusions that vocational experts reach. The *Vocational Expert Handbook*'s acknowledgment of this fact makes the agency's legal position here all the more unsustainable.

Specifically, the *Vocational Expert Handbook* instructs each vocational expert to "be prepared to cite, explain, and furnish any sources" relied upon in formulating his or her hearing testimony. *See Vocational Expert Handbook* at 3, 19, 20, 28, 31. It likewise advises vocational experts that they "should have available, at the hearing, any vocational resource materials [on which they] are likely to rely"; and that they "should be able to thoroughly explain what resource materials [they] used and how [they] arrived at [their] opinions." *Id.* at 37. It informs vocational experts that "[i]n some cases, the ALJ may ask you to provide relevant portions of materials you rely upon." *Id.*

These instructions reflect a reality—entirely at odds with the agency's position here—that the say-so of a vocational expert is not enough for the ALJ to make a finding supported by substantial evidence. The agency recognizes that it is good policy for vocational experts to "cite, explain, and furnish any sources" upon which they rely. But it cannot explain why that policy makes sense only when an expert is willing to turn over the data, but not when the expert refuses. It is no answer, moreover, to claim that the purported "confidentiality" of private labor market surveys provides vocational experts with a coherent basis for refusing to share such information.[7] After all, there are myriad ways to protect the use and disclosure of confidential information in adjudications,

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[7] Since 2002, when the Seventh Circuit adopted its rule requiring disclosure on request, courts within the circuit have rejected a "confidential[ity]" exception without any problematic results. *See, e.g., Ramzan v. Colvin*, No. 12C7362, 2015 WL 5921811, at *7 (N.D. Ill. Oct. 9, 2015).

just as in civil litigation. If agencies and courts are equipped to handle highly sensitive information related to national security, trade secrets, and foreign affairs, surely labor market surveys can likewise be shared in a manner that does not jeopardize the vocational expert's "client files."

The agency has also recognized in contexts beyond the *Vocational Expert Handbook* that the say-so of a vocational expert is not enough. In a policy interpretation ruling, the agency explained that a vocational expert's testimony does not "automatically 'trump[]' when there is a conflict" with other evidence. SSR 00-4P, 2000 WL 1898704, at *2 (Dec. 4, 2000). To the contrary, the agency imposes "an affirmative responsibility" on the ALJ to inquire into, and resolve, "any possible conflict" between the expert's testimony and the occupational information listed in the *DOT* before the ALJ can rely on the vocational expert's testimony. *Id.* at *4. In resolving any conflict, the ALJ must "identify and obtain a reasonable explanation" for the expert's testimony. *Id.* at *1. Without such an explanation, the ALJ cannot rely on the expert's testimony in weighing the evidence. *Id.*

By placing this obligation on the ALJ, the agency is not "importing" the Federal Rules of Evidence into disability determinations. Rather, SSR 00-4P simply reflects the common sense reality that vocational expert testimony is not dispositive simply because it comes from a so-called expert. The same reality applies to testimony that a vocational expert provides about the extent of "other work" available to the applicant. Where the expert's testimony is challenged—in this case

through cross-examination by the applicant, rather than by conflict with the *DOT*—the expert's say-so is not enough. The ALJ must look behind the expert's conclusion to test its basis. Absent that inquiry, the ALJ is left with nothing more than unsupported conclusions and *ipse dixit*, neither of which rises to the level of substantial evidence. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

The Seventh Circuit's approach comports not only with the agency's policies but also with common sense. Where an expert references on cross-examination the existence of data sources on which the expert is relying, there is no legitimate reason for the expert to withhold those sources if the applicant requests to see them. After all, the sources must exist because they provide the purported basis for the expert's testimony. Experience from the Seventh Circuit over the last sixteen years demonstrates that providing the data does not delay or disrupt social security disability hearings. And the agency's own regulations recognize the benefits of vocational experts having their sources available upon request as a matter of good policy. If experts have no sources then there is no basis for the ALJ to find that their testimony constitutes substantial evidence. If they do have sources, there is no legitimate basis to withhold them.

* * *

This Court has recognized that "[t]he Social Security hearing system is 'probably the largest adjudicative agency in the western world.'" *See Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983). Requiring vocational

experts to produce upon request the data underlying their conclusions advances the "need for efficiency" in this system while effectuating the requirement of substantial evidence. *Id.* (internal citation omitted). The rule is "understandable to the layman applicant," "efficient," and "fundamentally fair." *Perales*, 402 U.S. at 401-02. And, most important, it is consistent with this Court's interpretation of the requirement that a finding be supported by "substantial evidence" as required by § 405(g).

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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No. 17-1184

In the Supreme Court of the United States

MICHAEL J. BIESTEK, PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the hearing testimony of a vocational expert can constitute "substantial evidence" in the administrative record, 42 U.S.C. 405(g), supporting a factual finding by the Social Security Administration (SSA) that jobs that petitioner could perform existed in significant numbers in the national economy, if SSA rejected petitioner's request in that hearing to require the expert to produce documents to support her testimony.

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In the Supreme Court of the United States

No. 17-1184

MICHAEL J. BIESTEK, PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 880 F.3d 778. The opinion of the district court (Pet. App. 25a-34a) and the report and recommendation of the magistrate judge (Pet. App. 35a-74a) are not published in the Federal Supplement but are available at 2017 WL 1173775 and 2017 WL 1214456.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24a) was entered on December 27, 2017. The petition for a writ of certiorari was filed on February 21, 2018, and was granted on June 25, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions are set out in an appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

A. Statutory And Regulatory Framework

The Social Security Act (Act), 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to pay Social Security Disability Insurance (SSDI) benefits, 42 U.S.C. 423(a)(1)(E), and supplemental security income (SSI) benefits, 42 U.S.C. 1381a, to certain individuals with disabilities. See *Bowen* v. *Galbreath*, 485 U.S. 74, 75 (1988). As relevant here, an individual is considered disabled under the Act if he is unable to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" which can be expected to result in death or which has lasted or is expected to last at least 12 months. 42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A). The impairment must be of "such severity that [the individual] is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy," regardless "whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." 42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B).

1. Administrative Adjudication

Congress has directed SSA "to make findings of fact, and decisions as to the rights of any individual" who has filed a claim for SSDI and/or SSI benefits, 42 U.S.C. 405(b)(1), 1383(c)(1)(A). The "administrative structure and procedures" that SSA utilizes to fulfill that mandate "are of a size and extent difficult to comprehend." *Richardson* v. *Perales*, 402 U.S. 389, 399 (1971); *id.* at 406 (noting in 1971 over 20,000 hearings annually). The

resulting "hearing system is 'probably the largest adjudicative agency in the western world,'" *Heckler* v. *Campbell*, 461 U.S. 458, 461 n.2 (1983) (citation omitted), and it has continued to grow over time. In recent years, SSA has annually received about 2.6 million initial disability claims; completed on average about 670,000 hearings before administrative law judges (ALJs) at its third layer of adjudication; and paid about $192 billion to approximately 10 million SSDI and 8 million SSI recipients. SSA, *Annual Performance Report, Fiscal Years 2017-2019*, at 4, 32, 35 (2018) (*2018 SSA Report*), https://www.ssa.gov/budget/FY19Files/2019APR.pdf.[1]

a. General framework of adjudication

The Act vests the Commissioner of Social Security with "full power and authority" to adopt rules and regulations "to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same" in its administrative adjudication of disability claims. 42 U.S.C. 405(a); see 42 U.S.C. 1383(d)(1). Pursuant to regulations, the agency employs a multi-layer administrative review process, 20 C.F.R. 404.900(a), 416.1400(a), which SSA conducts in an "informal, non-adversarial manner," 20 C.F.R. 404.900(b), 416.1400(b), "operat[ing] essentially * * * as an adjudicator and not as an advocate or adversary." *Perales*, 402 U.S. at 403.

After receiving an initial application for benefits, SSA will issue an initial determination. 20 C.F.R. 404.900(a)(1), 416.1400(a)(1). If the claimant is dissatisfied with that determination, he may seek reconsidera-

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[1] SSA has informed this Office that the vast majority of the 670,000 hearings before ALJs annually are for disability claims.

tion. 20 C.F.R. 404.900(a)(2), 416.1400(a)(2). If dissatisfied with the reconsideration determination, the claimant may request a hearing before an ALJ. 20 C.F.R. 404.900(a)(3), 416.1400(a)(3). The Act provides that, during the course of any hearing, the ALJ may "examine witnesses" and "receive evidence." 42 U.S.C. 405(b)(1), 1383(c)(1)(A). In addition, "[e]vidence may be received at any hearing * * * even though inadmissible" under the "rules of evidence applicable to court procedure." *Ibid.* The regulations accordingly provide than an ALJ may "receive any evidence at the hearing that he or she believes is material to the issues, even though the evidence would not be admissible in court." 20 C.F.R. 404.950(c), 416.1450(c). The ALJ must then make factual findings based on "the preponderance of the evidence in the hearing record" and render a decision. 20 C.F.R. 404.929, 416.1429. If dissatisfied with the ALJ's decision, the claimant may request review by SSA's Appeals Council. 20 C.F.R. 404.900(a)(4), 416.1400(a)(4).

At each layer of agency adjudication, SSA employs a five-step sequential evaluation process to determine whether a claimant is entitled to disability benefits. 20 C.F.R. 404.1520(a)(4), 416.920(a)(4). The agency determines (1) whether the claimant is performing substantial gainful activity (if so, he is not disabled); (2) whether the claimant has a "severe" impairment (if not, he is not disabled); (3) whether that impairment meets or equals an impairment listed in SSA regulations (if so, the claimant is disabled); (4) if the impairment does not meet or equal the listings, whether the claimant's residual functional capacity allows him to perform his past work; and, (5) if not, whether the

claimant is able to perform other work that exists in significant numbers in the national economy, considering his residual functional capacity, age, education, and work experience. *Ibid.*; see *Barnhart* v. *Thomas*, 540 U.S. 20, 24-25 (2003) (describing this process). The claimant bears the burden of producing evidence at each of the first four steps, and SSA bears the burden of production at step five. 20 C.F.R. 404.1512(a) and (b)(3), 404.1560(c)(2), 416.912(a) and (b)(3), 416.960(c)(2); see Pet. App. 82a.

b. Step 5 of the sequential evaluation process

This case concerns evidence addressing the fifth step in the sequential evaluation process, in which the agency must determine whether the claimant can perform jobs that exist in significant numbers in the national economy. The existence of such jobs is established if they exist in significant numbers either in the region where the claimant lives or in several regions in the country. 20 C.F.R. 404.1560(c)(1), 416.960(c)(1); see 42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B).

Medical-vocational guidelines. In certain cases, that question will be resolved under SSA's medical-vocational guidelines, rather than through case-specific evidence about jobs that the claimant could perform. 20 C.F.R. 404.1569, 416.969; see 20 C.F.R. Pt. 404, Subpt. P, App. 2 (guidelines). The guidelines consist of "a matrix of the four factors identified by Congress—physical ability, age, education, and work experience—and set forth rules that identify whether jobs requiring specific combinations of these factors exist in significant numbers in the national economy." *Campbell*, 461 U.S. at 461-462 (footnote omitted). Under the guidelines, for instance, "a significant number of jobs exist for a person

who can perform light work, is closely approaching advanced age, has a limited education but who is literate and can communicate in English, and whose previous work has been unskilled." *Id.* at 462 n.4. When the guidelines apply to a particular claimant's circumstances, they relieve SSA "of the need to rely on vocational experts" to obtain evidence about "the types and numbers of jobs that exist in the national economy." *Id.* at 461.

Vocational Experts. A claimant often has material limitations that are not specifically addressed by the medical-vocational guidelines. In such cases, an ALJ will typically obtain testimony from a "vocational expert." 20 C.F.R. 404.1566(e), 416.966(e); SSA, *Hearings, Appeals, and Litigation Law Manual* (HALLEX) I-2-5-50.A (Aug. 29, 2014).[2]

A vocational expert is an individual who has "expertise and a current knowledge" of "[w]orking conditions and physical demands of various occupations" and "[t]ransferability of skills"; "[k]nowledge of the existence and numbers of jobs at all exertional levels in the national economy"; and "[i]nvolvement in or knowledge of placing adult workers, including those with disabilities, into jobs." HALLEX I-2-1-31.B.1 (June 16, 2016). After SSA determines that an individual's overall education and experience qualifies the individual as a voca-

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[2] The HALLEX is available at https://www.ssa.gov/OP_Home/hallex/hallex.html. Although some of the current HALLEX provisions were revised after the relevant July 2015 vocational-expert testimony in this case, SSA has informed this Office that the 2015 HALLEX provisions corresponding to those cited in this brief were materially similar, except for HALLEX I-2-1-31, which was issued in June 2016 but which SSA has informed this Office reflects SSA's prior practice.

tional expert, SSA will enter into a contract with the expert, *ibid.*, to provide "impartial expert testimony" in agency proceedings, HALLEX I-2-5-48 (June 16, 2016). The vocational expert is then added to a regional SSA roster, which SSA uses to select vocational experts for disability cases by rotation, subject to the expert's availability. HALLEX I-2-5-52.A (June 16, 2016). SSA compensates vocational experts on the basis of the service they provide, regardless of the content of their testimony or the outcome of the proceedings. Under SSA's current fee schedule, a vocational expert is paid $85.47 for the first appearance of the day and $43.29 for each additional appearance that same day.[3]

In advance of the hearing, the ALJ will provide the vocational expert with copies of the evidence relating to the claimant's vocational history. HALLEX I-2-5-48. A vocational expert will then appear at the hearing in person or by telephone or videoconference. 20 C.F.R. 404.936(c)(2), 416.1436(c)(2). At the hearing, the ALJ will ask the claimant (or his representative) whether the claimant has any objection to the vocational expert testifying. HALLEX I-2-6-74.B (June 16, 2016). The claimant may object "based on [the expert's] perceived bias or lack of expertise"; and, if the claimant objects, the ALJ must resolve that objection in writing or on the record at the hearing. HALLEX I-2-5-30.B (Apr. 1, 2016).

The ALJ will not ordinarily have determined the claimant's residual functional capacity—the claimant's

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[3] SSA has informed this Office that its regional offices now sometimes contract with entities to provide vocational experts for hearings, and that those contracts specify the same qualifying requirements for vocational experts. SSA, however, has confirmed to this Office that it contracted directly with the vocational expert in this case after it had determined her expert qualifications.

functional capacity in a work setting in light of his medical impairments, see 20 C.F.R. 404.1545(a), 416.945(a) —before the vocational expert testifies in a hearing. The ALJ therefore will typically ask the expert a series of hypothetical questions to identify the types and availability of work in the national economy that could be performed by a person similarly situated to the claimant with particular limitations reflecting potentially relevant (but yet-to-be-determined) functional capacities. See HALLEX I-2-6-74.D. After the ALJ determines the claimant's residual functional capacity, the ALJ can then utilize the expert's testimony corresponding to the most relevant hypotheticals.

Several publicly available sources frequently serve as a baseline for the testimony of vocational experts. The Department of Labor's *Dictionary of Occupational Titles* (4th ed., rev. 1991), and its companion publication, the *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles* (1993) (collectively, *Dictionary*), define jobs that exist in the national economy by "giv[ing] a job type a specific code—for example, '295.467-026 Automobile Rental Clerk'—and establish[ing], among other things, the minimum skill level and physical exertion capacity required to perform that job." *Brault* v. *Social Sec. Admin.*, 683 F.3d 443, 446 (2d Cir. 2012) (per curiam). But the *Dictionary* "does not report *how many* such jobs are available in the economy." *Ibid.* (emphasis added). Data compiled by the U.S. Bureau of Labor Statistics (BLS), state governments, and commercially available compilations can provide estimates of such numbers. Cf. 20 C.F.R. 404.1566(d), 416.966(d) (listing examples of data sources of which SSA will take administrative notice).

Such publicly available sources, however, have limitations that may require a vocational expert to draw on her professional expertise to answer an ALJ's hypothetical questions. For example, the *Dictionary* has not been updated in more than 20 years, and "the types of jobs in the workforce and job requirements change over time." See *2018 SSA Report* 14.[4] The BLS, in turn, aggregates job numbers for categories broader than those used in the *Dictionary*. And public sources like the *Dictionary* do not address whether the jobs they identify can be performed by individuals with specific limitations that may be relevant in a particular case, such as the use of a cane, the need for a sit/stand option, and the need to spend a percentage of time off task. Administrative Record (A.R.) 859 (D. Ct. Doc. 17 (Apr. 19, 2016)). As a result, a vocational expert will frequently need to rely on her vocational expertise to supplement such sources. A vocational expert's opinion may therefore be informed, for instance, by "information obtained directly from employers" or her "experience in job placement or career counseling." Social Security Ruling (SSR) 00-4p, *Titles II and XVI: Use of Vocational Expert and Vocational Specialist Evidence, and Other Reliable Occupational Information in Disability Decisions*, 65 Fed. Reg. 75,759, 75,760 (Dec. 4, 2000).

2. Judicial Review

A claimant may obtain judicial review of a final agency decision by civil action filed in district court. 42 U.S.C. 405(g), 1383(c)(3). On judicial review, "[t]he findings of [the agency] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. 405(g).

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[4] SSA has entered into an interagency agreement with BLS to develop new occupational data. See *2018 SSA Report* 14.

The question presented in this case is whether the evidence in the administrative record is sufficient—under the "substantial evidence" standard of review—to support the agency's "finding[] of * * * fact," 42 U.S.C. 405(g), made at step five of the sequential evaluation process based on a vocational expert's hearing testimony, that petitioner could perform work that existed in significant numbers the national economy.

B. Proceedings In This Case

Petitioner worked as a carpenter and construction laborer until 2005. Pet. App. 3a. In 2010, petitioner applied for SSDI and SSI benefits with an alleged disability onset date in October 2009. *Ibid.* Petitioner alleged that his disabilities included degenerative disc disease, hepatitis C, asthma, and/or depression. *Id.* at 3a, 37a.

1. Administrative Proceedings

a. After extensive administrative proceedings and a remand from district court, an ALJ held two more hearings before rendering a decision. Pet. App. 3a-4a, 75a-78a. In that decision (*id.* at 75a-113a), the ALJ concluded that petitioner had become "disabled" based on SSA's medical-vocational guidelines upon reaching age 50 in May 2013. *Id.* at 113a; see *id.* at 3a, 109a, 112a-113a. The ALJ, however, rejected petitioner's disability claim for the period before May 2013, concluding that petitioner was "not disabled" at that time. *Id.* at 113a; see *id.* at 78a-79a, 109a-112a.[5]

In finding that petitioner was not disabled before age 50, the ALJ determined that petitioner's impairments were severe, but that they did not meet or medically

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[5] This case accordingly concerns only petitioner's claim of entitlement to past disability benefits from October 2009 to May 2013.

equal any of the listings. Pet. App. 83a-89a. The ALJ then found petitioner's testimony about the intensity, persistence, and limiting effect of his symptoms not entirely credible. *Id.* at 92a, 102a, 107a-108a; see *id.* at 89a-108a. Based on other evidence, the ALJ found that, during the relevant period, petitioner had a "residual functional capacity" to perform "sedentary work," except that petitioner required work satisfying several additional criteria. *Id.* at 89a-90a.

More specifically, the ALJ concluded that petitioner required "a sit/stand option at will, but not to exceed 30 minutes at a time in either position"; needed "use of a cane for prolonged ambulation" and was unable to perform work requiring "crawling" or "climbing" ramps, stairs, ladders, ropes, or scaffolds; could do occasional flexion, extension, or rotation of the neck; could not work at hazardous heights, around dangerous machinery, or in temperature extremes; and needed to work in relatively clean air. Pet. App. 89a-90a. The ALJ further concluded that petitioner was limited to "simple, routine tasks such as those jobs [having a Specific Vocational Preparation time of] 1 or 2" due to pain, fatigue, and depression causing "occasional limitations in [his] ability to maintain concentration for extended periods," including "occasional limitations in [his] ability to carry out detailed instructions"; that petitioner could work without being "off task for more than 10% of the workday"; and that he was "limited to brief and superficial interaction" with others. *Ibid.*

In light of petitioner's residual functional capacity, age, education, and work experience, the ALJ determined that, before May 2013 (when petitioner turned 50 years old), petitioner was capable of performing work that existed in significant numbers in the national

economy. Pet. App. 109a-112a. The ALJ explained that, in finding the existence of such work, she had relied upon the July 2015 hearing testimony of "Erin O'Callaghan, an impartial vocational expert," *id.* at 77a. See *id.* at 111a-112a; see also A.R. 853-874 (transcript of O'Callaghan's testimony).

b. In the July 2015 hearing, before the vocational expert testified, the ALJ asked petitioner's counsel if he would stipulate to O'Callaghan's "qualifications to serve as a vocational expert." A.R. 853. Counsel stated that he'd "prefer not to stipulate" because he believed that government counsel would later argue that the stipulation would mean that petitioner should have to "take [O'Callaghan's] testimony as true." A.R. 853-854. Counsel made clear, however, that he had "no objections" to the expert "giving testimony." A.R. 854-855. O'Callaghan's resume (an exhibit in the agency record) shows that she received a master's degree in counseling before accumulating seven years of experience as a rehabilitation consultant and four additional years in her own company addressing the employment and vocational rehabilitation of disabled individuals. A.R. 1274 (resume).

The ALJ asked the vocational expert a series of questions involving a "hypothetical Claimant," after identifying most of the specific work criteria noted above as "additional limitations." A.R. 855-856; see A.R. 855-859. The ALJ first asked the expert whether she could identify a "sample of jobs" at the "light exertional level with those limitations." Pet. App. 116a (A.R. 856). The expert identified a series of representative jobs and estimated numbers of such jobs in Southeast Michigan and the national economy. *Ibid.*

The ALJ next asked if the expert could identify a sampling of jobs at the "sedentary level" that could be performed with those additional limitations. Pet. App. 116a (A.R. 857). The vocational expert testified that jobs "such as" a "bench assembler," "sorter," and "surveillance system monitor" could be performed. *Ibid.* The expert stated that about 3000 and 240,000 bench-assembler jobs; 1500 and 120,000 sorter jobs; and 1000 and 80,000 surveillance-system-monitor jobs existed in Southeast Michigan and nationally, respectively. *Ibid.* The expert also identified "representative" *Dictionary* codes for such work. *Ibid.*

In response to the ALJ's questions about whether such jobs would still be suitable if the claimant required "a cane for prolonged ambulation," the vocational expert testified that both the light-exertion and sedentary jobs would. A.R. 857. The ALJ then asked whether the jobs would continue to be suitable if, in addition, the claimant could not perform "overhead lifting" or lift more than five pounds (hypothetical limitations the ALJ later found did not apply to petitioner's residual functional capacity). A.R. 858; cf. Pet. App. 89a-90a. The expert identified certain light-exertion jobs that she had previously identified as accommodating those restrictions, and she testified that the hypothetical lifting restrictions would reduce the number of sedentary "sorter and bench assembler jobs by about 20 to 30 percent." Pet. App. 117a (A.R. 858). She further testified that the requirements and classification of the jobs to which she testified was consistent with that of the *Dictionary*, but that the *Dictionary* did not address "issues relating to a sit/stand option," "time off task," or "use of a cane," and that her testimony on such matters was "based on [her] professional experience." *Ibid.* (A.R. 859).

Petitioner, through counsel, cross-examined the vocational expert on several issues. A.R. 859-874. Counsel asked, for instance, if the jobs the vocational expert had identified would be available to a person who took medications that reduced his pace of work, and the expert testified that they would. A.R. 862-866. The expert explained that, "[g]enerally, people need to be working at a competitive rate for 80 percent of the workday," that the minimum amount of time "on task in order to maintain competitive work" "depends on the job," and that for "sorter/bench assembler jobs it's 80 percent of the workday." A.R. 863-864. In response to counsel's question about the basis for that testimony, the vocational expert stated that she had relied on her "professional experience," which included "[t]alking to employers, [and] doing job analysis on the job for these types of jobs." Pet. App. 117a-118a (A.R. 865).

Counsel asked whether the expert could provide "those job analys[e]s." Pet. App. 118a (A.R. 865). After the expert noted that they were "part of people's private confidential files," the ALJ stated that she was "not requiring" the expert to furnish such files, because the expert had testified based on "her overall training over the years, as well as her confidential file[s] of individual people." *Ibid.* In response to a follow-up question from the ALJ, the expert explained that "nothing" in various published employment sources "specifically addresses th[e] time off task issue," and that her testimony had been based on her "experience of talking with employers," her "experience doing job analysis, [and her] experience as a vocational rehabilitation consultant for the past 11 years." A.R. 866. Petitioner's counsel did not further explore the types of job analyses the expert had done; clarify whether the expert's testimony was based

on information actually contained within written job analyses or was based more generally on her "experience" obtained in the course of "doing job analysis"; or otherwise explore the possible probative value (or lack thereof) of any written materials. See *ibid.*

Counsel separately asked the vocational expert about the basis for her job numbers. Pet. App. 118a-119a (A.R. 869). The expert explained that her numbers were based on both BLS data and her "own individual market surveys." *Id.* at 119a (A.R. 869). Counsel did not request copies of, or ask questions about, the BLS data. Counsel instead asked whether the expert could "provide [her] own" surveys, which the expert explained were "part of [her] client files." *Ibid.* (A.R. 869-870). Counsel suggested that the expert could "take the client's names out," but the ALJ stated that her "ruling is that [she] would not require that [the vocational expert] provide" such client files. *Ibid.* Counsel again did not further explore the nature of any written information in the expert's client files. See *ibid.*

Toward the end of the July 2015 hearing, the ALJ stated that "an hour [had been] set aside" for the hearing, which the ALJ was "going to have to continue" because the next claimant was "out there waiting." A.R. 872-873. The ALJ informed counsel that he could "have as much time as [he] need[ed], but not on this day." A.R. 874. Petitioner's counsel represented that he did not "need to continue the hearing" and asked if he could submit a "closing memo." *Ibid.* The ALJ accordingly concluded the hearing but "h[e]ld the record open" for additional information. A.R. 877.

c. By letter dated September 28, 2015, petitioner's counsel submitted a vocational opinion dated September 23, 2015 (A.R. 1297-1298) from "vocational expert

Lee Knutson," whose proffered "opinion testimony" reflected his "extensive experience in vocational rehabilitation and placement, including almost 20 years as a vocational expert for [SSA]," A.R. 1290. See A.R. 1290-1292 (letter); see also A.R. 1293-1295 (Kutson's resume). After noting that vocational expert O'Callaghan had testified about three categories of suitable "sedentary" positions—"Bench assembler," "Sorter," and "Security Systems Monitor"—counsel's letter argued that Knutson's proffered opinion indicated that "the occupation of Security Systems Monitor * * * is no longer considered unskilled in the post 2001 world" and was, for that reason, not a correct response to the ALJ's hypothetical about suitable sedentary work. A.R. 1291. Although Knutson's expert opinion responded directly to that one aspect of O'Callaghan's testimony, Knutson did not respond to O'Callaghan's description of, or her estimated job numbers for, the bench assembler and sorter positions. See A.R. 1297-1298. Nor did he respond to O'Callaghan's testimony that such positions require that workers be on task at least 80% of the workday. See *ibid.*

d. In her subsequent decision, the ALJ found that "jobs exist in the national economy" suitable for someone in petitioner's position "[b]ased on the testimony of the vocational expert," who had identified "representative sedentary unskilled occupations such as a bench assembler * * * and sorter," with 240,000 and 120,000 jobs nationally. Pet. App. 111a-112a (emphasis omitted). The ALJ did not rely on the availability of security-system-monitor positions, over which Knutson's vocational opinion gave rise to a factual dispute. See *ibid.* The ALJ instead explained that she "g[ave] little weight"

to Knutson's opinion, because it addressed "jobs [that] are not relevant to [the ALJ's] decision." *Id.* at 112a.

2. Judicial Review

a. On judicial review, a magistrate judge recommended granting summary judgment to the government. Pet. App. 35a-74a. As relevant here, the magistrate judge concluded that the ALJ's step-five determination that suitable jobs existed in significant numbers in the national economy was supported by "substantial evidence" in the agency record. *Id.* at 69a-73a. The vocational opinion by Knutson, the magistrate judge explained, addressed "occupations that are completely different from those which the ALJ found that [petitioner] can perform." *Id.* at 72a-73a.

The district court adopted that recommendation and granted the government summary judgment. Pet. App. 25a-34a. The court held that a vocational expert's testimony, even though it is based on the expert's professional experience, can constitute "substantial evidence" to support an ALJ's decision concerning the availability of jobs in the national economy. *Id.* at 28a. The court declined petitioner's invitation to hold that "the [vocational expert] was required to provide [documentary] support for her testimony," *ibid.* See *id.* at 28a-30a.

b. The court of appeals affirmed. Pet. App. 1a-23a. As relevant here, the court rejected petitioner's argument, based on the Act's "substantial evidence" standard of review, that "the ALJ erred by refusing to require the vocational expert to produce data or other documentation to support her opinions regarding the work available to [petitioner]," *id.* at 20a. See *id.* at 20a-22a. The vocational expert, the court noted, based her testimony on the *Dictionary* and her "'professional ex-

perience,' gained from talking with employers and conducting job analyses." *Id.* at 20a. Under the governing standard, the court explained, the ALJ retains "responsibility for weighing the credibility of witnesses," and the ALJ here "acceptably fulfilled that obligation." *Id.* at 22a.

The court of appeals rejected petitioner's contention that the vocational expert's "testimony falls short of 'substantial evidence'" because, in petitioner's view, "little substantiates the reliability of the vocational expert's testimony." Pet. App. 20a. The court declined to follow Seventh Circuit decisions that have stated that such experts must "provide the data and reasoning used in support of their conclusions upon request," noting that "there is little clarity on how to apply" the Seventh Circuit's decisions, which have not been a "'popular export'" in other courts. *Id.* at 21a-22a (citation omitted).

SUMMARY OF ARGUMENT

I. The court of appeals correctly concluded that the administrative record contains "substantial evidence" to support the ALJ's challenged factual finding, based on the testimony of an impartial vocational expert, that jobs suitable for petitioner existed in significant numbers in the national economy. See Pet. App. 20a-22a.

A. The "substantial evidence" standard is a "term of art" in administrative law governing judicial review of agency factfinding. *T-Mobile S., LLC* v. *City of Roswell*, 135 S. Ct. 808, 815 (2015) (quoting *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963)). The standard asks only whether the evidence actually contained in the agency record would be sufficient that a "reasonable mind" might accept it "as adequate to support" the factual finding at issue. *Consolidated Edison*

Co. v. *NLRB*, 305 U.S. 197, 229 (1938) (*Consolidated Edison*).

The genesis of the substantial-evidence standard for judicial review of agency action was the sufficiency-of-the-evidence test used in judicial proceedings. Like that test for judicial proceedings, the substantial-evidence test does not encompass an inquiry into procedural issues, such as whether the agency erroneously admitted particular evidence into, or excluded it from, the evidentiary record, or whether the agency should have facilitated the discovery of additional facts that a party might then have sought to have admitted into the record. The test simply takes the state of the agency record as it stands, leaving such other matters to be raised in a proper—and distinct—procedural challenge to the particular agency ruling denying the party's evidentiary objection or discovery request. In short, the test evaluates the reasonableness of the agency's factfinding "*on the basis of the evidence before it*," even if that evidence could potentially "be refuted by other evidence that was not presented to the decision-making body." *Carlo Bianchi & Co.*, 373 U.S. at 715.

Petitioner concedes that if "no one questions the vocational expert's foundation or reasoning, an ALJ is entitled to accept the vocational expert's conclusion." Br. 29 (citation omitted); see Pet. 23-24. That concession itself demonstrates that the vocational expert's testimony here constitutes substantial evidence supporting the ALJ's finding concerning the availability of suitable jobs. Regardless whether a party to the proceeding stays silent, or instead "questions" the basis for the expert's evidence and unsuccessfully attempts to obtain additional documentary evidence that might corrobo-

rate or undermine the testimony, the state of the evidentiary record is the same. If the evidentiary record contains "substantial evidence" in the absence of an objection, so too does the same evidentiary record that results when the agency adjudicator rejects a party's procedural request to develop the record further.

B. It follows that petitioner's "substantial evidence" challenge (Pet. i) lacks merit. The agency record includes the testimony of an impartial vocational expert directly supporting the ALJ's factual finding that a significant number of jobs petitioner could perform existed in the national economy. Nothing in that testimony, which the ALJ credited, is irrational or implausible. And petitioner's post-hearing submission of another expert's vocational opinion conspicuously failed to challenge the first expert's testimony on which the ALJ based her factfinding. Especially given the long established practice of relying on the testimony of qualified vocational experts in SSA disability hearings, in these circumstances the record contains "sufficien[t]" evidence that "a reasonable mind might accept as adequate to support" the ALJ's finding. See *Consolidated Edison*, 305 U.S. at 229 (emphasis omitted).

II. Although petitioner has framed his legal arguments in "substantial evidence" terms, Pet. i, he also states that a "procedural mechanism[]" for "[r]equiring the production of underlying data upon request" by a claimant would be "'fundamentally fair'" and should be made available to facilitate the "probing [of vocational experts'] conclusions" and the testing of their reliability. Br. 29, 41 (citation omitted). As explained below, petitioner cites no provision of the Act or SSA's implementing regulations, or of the Constitution, requiring such a procedural mechanism. And SSA's existing

administrative process involving presumptively reliable testimony by impartial experts provides a fundamentally fair process for claimants to test the expert's testimony through cross-examination and the presentation of additional evidence. The manner in which this case comes to this Court, however, appears to make the case an unsuitable one to fully address those issues: the court of appeals ruled only on substantial-evidence grounds and did not resolve any procedural contentions; petitioner's question presented is similarly limited; and petitioner has briefed only the question of substantial evidence, and does not contend that the ALJ's distinct procedural rulings violated any relevant source of procedural law.

In any event, the administrative proceedings in this case were fair and did not violate any applicable procedural requirements. The expertise and impartiality of vocational experts makes their testimony presumptively reliable. And once such an expert testifies about relevant jobs in the national economy, the claimant both has the opportunity to probe the reliability of that testimony through cross-examination and may submit other evidence in response, including evidence from another vocational expert. As this Court has recognized, the reliability of testimonial evidence is properly tested in the crucible of cross-examination, which is the age-old process for ferreting out the truth.

Petitioner, who like most claimants was represented by counsel at his disability hearing, never took the opportunity to probe the reliability of the vocational expert's testimony through cross-examination. Counsel never asked about the nature and type of any analyses informing the expert's testimony or inquired about the expert's methodology and original sources of data on

which she based any analysis. Nor did counsel even ask about the nature or relevance of any documents the vocational expert might have retained in the course of her professional work or the type of information and analysis they might actually have contained. Such questions could have developed the evidentiary record by eliciting further testimony about the basis for the expert's conclusion. If the expert could not persuasively answer probing questions about the foundation for her testimony or the reliability of her conclusions to an ALJ's satisfaction, or if the expert's responses included conflicting testimony, the cross-examination might have developed testimonial evidence in the administrative record that could have rendered the expert testimony to be insubstantial on the record as a whole. Petitioner's counsel, however, simply opted not to explore such lines of inquiry.

ARGUMENT

I. THE ADMINISTRATIVE RECORD CONTAINS "SUBSTANTIAL EVIDENCE" SUPPORTING THE ALJ'S FACTUAL FINDING THAT SUITABLE JOBS EXISTED IN SIGNIFICANT NUMBERS IN THE NATIONAL ECONOMY

The Social Security Act directs SSA to "make findings of fact and decisions as to the rights of any individual" who has filed a claim for SSDI and/or SSI benefits. 42 U.S.C. 405(b)(1), 1383(c)(1)(A). The Act then provides for judicial review of the resulting agency decision in which, as relevant here, "[t]he findings of the [agency] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. 405(g); see 42 U.S.C. 1383(c)(3). The deferential "substantial evidence" standard for reviewing the sufficiency of the evidence in the administrative record to support an agency finding of fact applies throughout administrative law,

and it merely requires that the evidence actually contained in the administrative record be sufficient that a "reasonable mind" might accept the evidence "as adequate to support" the factual finding in question. *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938).

The substantial-evidence standard takes the evidentiary record as it stands and calls for the reviewing court to determine if the agency could rationally make the findings it did based on that record. That standard of review leaves questions concerning a party's requests to obtain additional evidence that might have been, but was not, obtained or admitted into the agency record for resolution in distinct procedural challenges to the agency rulings denying such requests. In this case, under the substantial-evidence standard of review of the sufficiency of the evidence, the vocational expert's hearing testimony in the administrative record is sufficient to support the ALJ's finding that jobs suitable for petitioner existed in significant numbers in the national economy.

The structural provisions of the SSA adjudicatory system concerning the qualifications and selection of impartial vocational experts, and the ability of claimants to contest those qualifications, cross-examine the expert, and offer evidence of their own, provide assurances of reliability for the ALJ's fact-finding. See pp. 44-51, *infra*. There is no basis in the substantial-evidence test for judicial review of evidentiary sufficiency to impose the rigid document-on-demand rule that petitioner urges.

A. The Substantial-Evidence Test Measures Only The Sufficiency Of The Evidence Actually Contained In The Agency Record

1. The "statutory phrase 'substantial evidence' is a 'term of art' in administrative law that describes how 'an administrative record is to be judged by a reviewing court.'" *T-Mobile S., LLC* v. *City of Roswell*, 135 S. Ct. 808, 815 (2015) (quoting *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963)). As the text of Section 405(g) makes clear, that standard of review applies to agency "findings of * * * fact" in SSA hearings, 42 U.S.C. 405(g), and measures the "sufficiency of the evidence" to support such findings, *Consolidated Edison*, 305 U.S. at 229 (emphasis omitted). Under the substantial-evidence standard, a reviewing court determines whether, in light of "the whole record" actually assembled or designated in agency proceedings, there exists "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477, 488 (1951) (quoting *Consolidated Edison*, 305 U.S. at 229); see, *e.g.*, *Dickinson* v. *Zurko*, 527 U.S. 150, 162 (1999); *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) (*Columbian Enameling*). That standard of review for agency factfinding is even more deferential than the "clearly erroneous" standard that applies to review a trial court's "findings of fact." *Zurko*, 527 U.S. at 152-153.

2. This Court's development of the substantial-evidence standard, which had its "genesis in appellate court review of jury verdicts," 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 11.2, at 976 (5th ed. 2010); see *id.* at 878, confirms its scope.

Well before Congress' 1939 enactment of Section 405(g)[6] and 1946 enactment of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*, this Court had described the legal standard for determining whether a case should be submitted to a jury—a standard that determines when the trial court had authority to direct a verdict—as whether the evidentiary record contained "substantial evidence to go to the jury." *Chicago Junction Ry. Co.* v. *King*, 222 U.S. 222, 224 (1911); see also, *e.g.*, *Abrams* v. *United States*, 250 U.S. 616, 619 (1919); *Stilson* v. *United States*, 250 U.S. 583, 588 (1919); *Union Pac. R.R.* v. *Huxoll*, 245 U.S. 535, 537 (1918). Under the jury standard, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient" to avoid a directed verdict (or summary judgment), because "there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); see *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993); *Gunning* v. *Cooley*, 281 U.S. 90, 94 (1930).

By 1938, the Fourth Circuit in *Appalachian Electric Power Co.* v. *NLRB*, 93 F.2d 985 (*Appalachian Electric*), like other courts of appeals, had concluded that "[t]he rule as to substantiality [in judicial review of agency action] is not different * * * from that to be applied in reviewing the refusal to direct a verdict at law, where the lack of substantial evidence is the test of the right to a directed verdict." *Id.* at 989; see, *e.g.*, *Ballston-Stillwater Knitting Co.* v. *NLRB*, 98 F.2d 758, 760 (2d Cir. 1938); *NLRB* v. *Thompson Prods., Inc.*, 97 F.2d 13, 15 (6th Cir. 1938).

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[6] Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1368-1371 (enacting, *inter alia*, Section 405(a), (b), and (g)).

Soon thereafter, this Court decided the two path-marking decisions—*Consolidated Edison* (1938), and *Columbian Enameling* (1939)—that are now "considered authoritative in defining the words 'substantial evidence'" in the administrative-law context. *Consolo* v. *Federal Mar. Comm'n*, 383 U.S. 607, 620 & n.18 (1966) (citation omitted). Both decisions cited and followed the Fourth Circuit's *Appalachian Electric* decision in holding that "substantial evidence" requires "more than a mere scintilla" and means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison*, 305 U.S. at 229 (citing *Appalachian Electric*, 93 F.2d at 989, and similar decisions); accord *Columbian Enameling*, 306 U.S. at 300. Echoing the jury-trial origins of that test, the Court emphasized that "[s]ubstantial evidence" in the context of judicial review of agency action must be "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Columbian Enameling*, 306 U.S. at 300 (citing *Appalachian Electric*, 93 F.2d at 989, and this Court's sufficiency-of-the-trial-evidence decision in *Gunning*, 281 U.S. at 94); accord, *e.g.*, *Illinois Cent. R.R.* v. *Norfolk & W. Ry. Co.*, 385 U.S. 57, 66 (1966); *Consolo*, 383 U.S. at 620; *Universal Camera Corp.*, 340 U.S. at 477.

B. The Sufficiency Of The Evidence In The Administrative Record, As Measured By The Substantial-Evidence Test, Is Distinct From Procedural Questions Concerning The Creation Of That Record

Significantly for present purposes, the substantial-evidence inquiry is "limited to the administrative record" and simply measures the propriety of "what the agency did *on the basis of the evidence before it*." *Carlo*

Bianchi & Co., 373 U.S. at 715. For that reason, "a decision may be supported by substantial evidence" "even though [that evidence] could be refuted by other evidence that was not presented to the decision-making body." *Ibid.* This Court's decisions applying the substantial-evidence test, and petitioner's own contentions, show that the record evidence here satisfies that standard.

1. The Court has long understood challenges to the sufficiency of the evidence in the agency record under the "substantial evidence" framework to be legally distinct from procedural challenges to the agency's denial of a party's request to obtain additional evidence or admit it into the record.

This Court's decision in *Consolidated Edison*—one of the decisions "considered authoritative in defining the words 'substantial evidence,'" *Consolo*, 383 U.S. at 620 & n.18 (citation omitted)—addressed a company's procedural challenge to the NLRB's "refusal to receive the testimony of certain witnesses," *Consolidated Edison*, 305 U.S. at 225, *id.* at 224-229, before separately resolving the company's challenge to "[t]he sufficiency of the evidence" in the agency record under the "substantial evidence" standard, *id.* at 229-231 (emphasis omitted). With respect to the procedural-due-process challenge, the Court determined that the agency had erred in refusing to develop the record with the testimony proffered by the company. *Id.* at 226. The Court nevertheless rejected the company's procedural challenge because the company had failed to utilize an agency process to submit additional evidence. *Id.* at 226-228. The Court then separately turned to the evidence actually in the agency record—which, of course, did not include the company's wrongfully excluded testimony—

and concluded that it was sufficient to uphold the Board's findings under the "substantial evidence" standard because "a reasonable mind might accept [that evidence] as adequate to support [the Board's] conclusion." *Id.* at 229-230.

The Court's decision in *Heckler* v. *Campbell*, 461 U.S. 458 (1983), is similar. In *Campbell*, SSA had relied on its medical-vocational guidelines to determine that "a significant number of jobs existed" that the claimant could perform. *Id.* at 463. The court of appeals overturned the agency's denial of benefits as "not supported by substantial evidence" because, the court reasoned, the hearing record contained no evidence about particular jobs suitable for the claimant to perform. *Id.* at 465 (citation omitted). This Court reversed, holding that the agency could resolve the "factual issue" concerning the types and number of jobs that existed in the national economy by rulemaking, rather than on a case-by-case basis using "vocational experts at each disability hearing." *Id.* at 468; see *id.* at 465-468.

Having rejected the claimant's substantial-evidence challenge, the Court in *Campbell* declined to address the claimant-respondent's related—but legally distinct—argument that an agency regulation and the Due Process Clause independently required the agency "to specify alternative available jobs" in a disability hearing. 461 U.S. at 468-469 & n.12. Those issues, the Court concluded, were not fairly presented by the court of appeals' substantial-evidence decision on review. *Id.* at 468.

Both *Consolidated Edison* and *Campbell* reflect that judicial review to determine whether substantial evidence supports an agency's factual finding is not the means by which a party may challenge agency decisions

affecting what evidence may or must be obtained by a party or admitted into the administrative record.

2. This Court has applied similar principles in the criminal context. In *McDaniel* v. *Brown*, 558 U.S. 120 (2010) (per curiam), the State relied at trial on a DNA expert who, the State later conceded, made significant errors in her testimony, including testimony that erroneously indicated that DNA testing had shown only "a 0.000033% chance that [the defendant] was innocent." *Id.* at 127-128. Both the district court and court of appeals on federal habeas review concluded (in light of a post-trial expert report identifying the errors) that the expert DNA testimony was "unreliable" and thus could not be considered when reviewing the sufficiency of the evidence. *Id.* at 126-127 (citations omitted). This Court reversed, concluding that it is "clearly correct" that review for evidentiary sufficiency determines "'whether the jury acted in a rational manner * * * based on the evidence before it, not whether improper evidence violated due process.'" *Id.* at 130-131 (citation omitted). For that reason, the Court explained, a "'reviewing court must consider all of the evidence admitted'" at trial, even expert evidence "admitted erroneously." *Id.* at 131 (citation omitted); see *id.* at 137-138 (Thomas, J., concurring). Moreover, the Court declined to consider the respondent's argument for affirmance on the alternative ground that admitting into evidence the "'unreliable and misleading'" expert testimony violated his procedural due-process rights. *Id.* at 134-136. That argument asserting procedural error, the Court concluded, had not been preserved by making a sufficiency-of-the-evidence argument. *Id.* at 135-136; see also *Lockhart* v. *Nelson*, 488 U.S. 33, 40-41 (1988) (similar evidentiary sufficiency decision).

The same logic applies with equal force to judicial review of evidentiary sufficiency under the substantial-evidence standard. So long as the agency could have rationally made its factual finding on the evidence in the administrative record before it, *i.e.*, so long as that evidence is "sufficien[t]" for a "reasonable mind" to accept it "as adequate to support" the agency's factfinding, *Consolidated Edison*, 305 U.S. at 229 (emphasis omitted), substantial evidence supports the agency finding.

3. Petitioner emphasizes (Br. 29) that, under his version of the substantial-evidence inquiry, a social security disability claimant "cannot attack the substantiality of an expert's conclusions" if the claimant failed to employ the "procedural mechanisms available for probing those conclusions." As a result, petitioner continues (*ibid.*), "[w]hen no one questions the vocational expert's foundation or reasoning, an ALJ is entitled to accept the vocational expert's conclusion" as "substantial evidence." *Donahue* v. *Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002). But, petitioner contends, "if [the expert's testimony is] challenged" by the claimant at the hearing, the "vocational expert [must] make available the data underlying the expert's opinion" in order qualify the expert's testimony as "substantial evidence." Pet. 23-24. Petitioner's theory fundamentally misunderstands the nature of the substantial-evidence inquiry.

The substantial-evidence test, as discussed above, evaluates the sufficiency of the evidence to support the agency's factfinding "on the basis of the evidence before [the agency]." *Carlo Bianchi & Co.*, 373 U.S. at 715 (emphasis omitted). If a claimant in SSA proceedings stays silent and thereby fails to utilize "procedural mechanisms available for probing" a vocational expert's

testimony (Pet. Br. 29), the state of the evidentiary record will be exactly the same as when the claimant unsuccessfully requests documentary evidence from the expert that could potentially undermine her testimony. In both cases, the expert's testimony is what remains in the administrative record. As a result, if, as petitioner acknowledges, the evidentiary record is deemed sufficient and sufficiently reliable to constitute "substantial evidence" in the absence of an objection, so too does the same evidentiary record that results when the agency adjudicator rejects a party's procedural request to obtain further evidence and include it in the record.

Moreover, petitioner's contention that a vocational expert's testimony is not "substantial evidence" if the expert does not provide upon request a "written report or other documentation" to support her testimony, Br. 28 (citations omitted), erroneously disregards the focus of the substantial-evidence inquiry: the actual evidence in the record. A vocational expert, for instance, might persuasively answer a claimant's questions on cross-examination about the methodology she employed and might identify the specific publicly available data that she used to create any particular written analysis that may actually have formed the basis for her testimony. The fact that the expert did not produce an actual copy of any such written analysis would provide no sound basis for concluding that the hearing record lacks substantial evidence to support the ALJ's factual finding on the basis of the expert testimony. Yet petitioner's document-on-demand theory of the substantial-evidence test would do precisely that. It would elevate what petitioner desires as a procedural requirement—the production of certain documents upon request—into a touchstone of

substantial evidence, regardless of the state of the evidence in the agency record.

C. Petitioner Misreads *Richardson* v. *Perales* And Identifies No Decision Of This Court Supporting His View Of The Substantial-Evidence Test

Petitioner's misunderstanding of the substantial-evidence test flows from his misreading of the decisions of this Court. Petitioner principally relies (Br. 18, 22-30) on *Richardson* v. *Perales*, 402 U.S. 389, 403 (1971), which he views as "mandat[ing] that vocational experts provide the data underlying their conclusions upon an applicant's request," Br. 22 (capitalization omitted). That is incorrect. The portion of *Perales* that petitioner cites for his understanding of "substantial evidence" resolves different questions involving procedural due process. Petitioner identifies (Br. 30-34) no other decision of this Court supporting his position.

1. Petitioner's reliance on Perales *is misplaced*

Petitioner contends (Br. 18) that *Perales* "held" that "an expert's conclusions must have evidentiary support and be subject to meaningful cross-examination to constitute 'substantial evidence.'" That is incorrect. Petitioner relies (Br. 22-25) on Part V of the *Perales* decision, 402 U.S. at 401-406, but that portion of *Perales* rests on procedural due-process grounds, not the sufficiency of the evidence.

a. The Court in *Perales* granted the government's certiorari petition to review the Fifth Circuit's holding that medical reports prepared by physicians who did not provide live testimony in SSA disability proceedings were not "substantial evidence" because such reports rested on purportedly "uncorroborated hearsay" when

the claimant objected to their admission and live testimony contradicted them. 402 U.S. at 398; see also *id.* at 390. The court of appeals' holding had been based on a "single sentence from *Consolidated Edison*," which stated that "'[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence.'" *Id.* at 407 (quoting *Consolidated Edison*, 305 U.S. at 230). The Court clarified in *Perales* (in one portion of Part VI of its opinion) that *Consolidated Edison* did not impose a "blanket rejection" of "administrative reliance on hearsay," but rather concluded that evidence lacking "'*rational* probative force'" will not constitute substantial evidence. *Id.* at 407-408 (quoting *Consolidated Edison*, 305 U.S. at 230) (emphasis added). *Perales*, however, did not simply clarify that single sentence from *Consolidated Edison*. The Court also made clear that it granted certiorari to resolve what it characterized an "important procedural due process issue." *Id.* at 398; see also *id.* at 402 ("The question, then, is as to what procedural due process requires with respect to examining physicians' reports in a social security disability claim hearing.").

The government in *Perales* had argued that that Fifth Circuit's decision was incorrect under the Social Security Act's express authorization to consider evidence that would be inadmissible under rules of evidence governing court procedure, 42 U.S.C. 405(b)(1), and the Act's "substantial evidence" standard of review, 42 U.S.C. 405(g). See Gov't Br. at 15-16, *Perales*, *supra* (No. 70-108). "The only basis" on which those statutory provisions could be attacked, the government argued, would be that "they operate, in some way, to deny 'due process of law,' contrary to the Fifth Amendment." *Id.* at 16.

Perales, in turn, conceded that "the substantial evidence rule" required a reviewing court to uphold agency factfinding "if there is *any* evidence which will support the decision." Resp. Br. at 8, *Perales*, *supra*. Perales therefore argued that, although judicial review must proceed under the "substantial evidence rule," "the *procedural safeguards of due process*" nevertheless secured a "right" to "confrontation and cross-examination" of the non-testifying authors of the medical reports. *Id.* at 6-7 (emphasis added). His submission was that the "admission of written [hearsay] statements or reports concerning the crucial issue [of medical impairment,] which are disputed by other live witnesses, cannot be substantial evidence," because "calling [those materials] substantial evidence is a basic denial of due process." *Id.* at 9; see *id.* at 8-18 (making "procedural due process" argument).

The Court in *Perales* thus briefly noted the statutory "substantial evidence" standard in Section IV of its opinion (which comprises only one paragraph), 402 U.S. at 401, before turning in Section V (*id.* at 401-406) to resolve Perales's arguments concerning the application of "procedural due process" in SSA proceedings, *id.* at 401-402. The Court stated that "[t]he question" that it was called upon to answer was "what procedural due process requires with respect to examining physicians' reports in a social security disability claim hearing." *Id.* at 402; see *id.* at 414 (Douglas, J., dissenting) ("Review of the evidence is of no value to us. The vice is in the *procedure* which allows it in without testing it by cross-examination.") (emphasis added).

Perales was decided about five years before the Court's seminal procedural due-process decision in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). But the Court's

evaluation of factors "assur[ing] [the] underlying reliability and probative value" of the reports even without the authors' cross-examination, *Perales*, 402 U.S. 402; see *id.* at 402-406, as well as the "pragmatic" interest in avoiding the massive burden of requiring live testimony by medical experts in all disability cases, *id.* at 406, reflected what *Eldridge* would later synthesize doctrinally for due-process purposes as a balancing of the risk of error under the challenged procedures and the value of imposing additional procedural safeguards against the "administrative burden and other societal costs" of imposing additional process. See *Eldridge*, 424 U.S. at 343, 347.

b. Unlike the claimant in *Perales*, however, petitioner has not made a procedural due-process argument in this Court. Nor has petitioner pointed to any procedural rights specified by Congress or established by SSA regulation to govern the agency's conduct of its hearings. Rather, he seeks to insert such rights into the doctrinally distinct substantial-evidence standard for *judicial review* of the ALJ's factfinding based on those hearings. Pet. Br. 22-28. Petitioner's submission, if accepted, would substantially disrupt administrative-law jurisprudence.

In *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519 (1978), this Court noted that it had "continually repeated" the "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure," *id.* at 544, and it cautioned that a reviewing court "stray[s] beyond the judicial province" by "impos[ing] upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good," *id.* at 549. The Court has thus emphasized that the APA "sets forth the

full extent of judicial authority to review executive agency action for procedural correctness." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). The substantial-evidence standard in Section 405(g) governing judicial review of the sufficiency of the evidence in the administrative record applies throughout administrative law, as codified in the APA, 5 U.S.C. 706(2)(E), and numerous other statutes governing judicial review of agency action.[7] Distorting that standard in the manner petitioner proposes would improperly circumvent the very limited judicial authority to prescribe procedures for administrative agencies. Cf. 5 U.S.C. 706(2)(D) and (E) (providing APA standards of judicial review that identify as separate agency errors the failure to observe "procedure required by law" and the making of findings "unsupported by substantial evidence").

Such a doctrinal innovation would be particularly unwarranted here. Congress has vested SSA with 'full power and authority" to make "rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same" in disability cases. 42 U.S.C. 405(a). That provision confers "exceptionally broad authority" to establish regulations appropriate to administer the vast hearing system required to implement the Act. *Campbell*, 461 U.S. 466. Yet petitioner points to no regulatory provision governing his hearing that he contends was violated.

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[7] See, *e.g.*, 2 U.S.C. 1407(d)(3); 5 U.S.C. 7703(c)(3); 12 U.S.C. 1848; 15 U.S.C. 717r(b); 21 U.S.C. 877; 29 U.S.C. 160(e), 660(a); 30 U.S.C. 816(a)(1); 49 U.S.C. 44703(d)(3).

2. No other decision of this Court supports petitioner's understanding of substantial-evidence review

Aside from his misplaced reliance on *Perales*, petitioner identifies no basis for his understanding of the substantial-evidence standard of judicial review. Petitioner relies (Br. 30-34) on three decisions in purportedly "analogous administrative contexts." Br. 30-31. But those decisions have no relevance to the question presented here, beyond the fact that each involved "substantial evidence" challenges to agency decisions (in materially different circumstances).

a. *Baltimore & Ohio Railroad* v. *Aberdeen & Rockfish Railroad*, 393 U.S. 87 (1968), involved review of an Interstate Commerce Commission decision in which the Commission had rejected a proffered rate division for North-South freight rail service on the ground that it provided Northern rail lines a smaller share of the revenues from joint rates than was warranted by the Northern lines' "share of the expenditures made in providing the joint service." *Id.* at 88-89; see *id.* at 90. The administrative record, however, did not include any evidence about "[t]he costs of North-South traffic" at issue. *Id.* at 90. Rather than "gather" such evidence, the Commission had based its decision on "average costs * * * relat[ing] to all Northern traffic and all Southern traffic." *Id.* at 90-91.

This Court concluded that the Commission's decision was not supported by "substantial evidence" because no evidence in the administrative record indicated that the "territorial average costs [in the record] are necessarily the same" as the "costs incurred in handling North-South freight traffic." 393 U.S. at 91. *Baltimore & Ohio Railroad* thus simply reflects that an expert agency *adjudicator* cannot assert factual conclusions about the

specific circumstances of a particular case without any evidentiary support in the administrative record. The decision does not speak to the distinct question here, which concerns actual evidence in the agency record—testimony by an impartial vocational expert—that affirmatively supports the ALJ's factual finding.

b. Petitioner's reliance (Br. 32-33) on *Columbian Enameling* is similarly misplaced. In *Columbian Enameling*, the Court held that the NLRB's finding that an employer had "refused to bargain collectively with the Union on July 23, 1935" was not supported by substantial evidence. 306 U.S. at 293, 300. That was so because, under the National Labor Relations Act, the employer had no bargaining obligation "without some indication given to him by [his employees] or their representatives of their desire or willingness to bargain," *id.* at 297, and because the administrative record contained "no evidence that the Union gave to the employer * * * any [such] indication" before the key July 23 date, *id.* at 298. See *id.* at 298-300. That straightforward application of the substantial-evidence standard has no relevance here, where, again, the record contains evidence—vocational expert testimony—directly supporting SSA's determination.

Petitioner asserts (Br. 33) that SSA in this case made "almost precisely the error this Court identified in *Columbian Enameling*." That is so, petitioner continues, because the employer in *Columbian Enameling* "'pointedly brought to the attention of the Board'" the lack of any evidence reflecting a refusal to bargain, after which the agency made "'no attempt * * * to supply the omission,'" Br. 32 (quoting *Columbian Enameling*, 306 U.S. at 298), whereas, in this case, petitioner "pointed out to [SSA] an 'omission' in the record," *i.e.*,

"the data underlying the [vocational] expert's opinion," Br. 33. It may well be that petitioner, like the employer in *Columbian Enameling*, preserved his claim of error by raising it before the agency, but the actual error in *Columbian Enameling* was the lack of any relevant evidence in the agency record. This case, as explained, does contain relevant evidence in the form of an impartial vocational expert's direct testimony about the availability of jobs that petitioner could perform.

c. Finally, petitioner notes (Br. 33) that the Court in *Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972), concluded that "expert testimony alone" can constitute "substantial evidence." In that case, the Commission's jurisdiction over an electric utility rested on an agency finding that the utility had transmitted electrical energy (through another utility) across state lines. *Id.* at 454, 456-457. The agency based that finding on an analysis of power flow at a particular location on the power grid, *id.* at 461, that "rested on the testimony of expert witnesses," *id.* at 463. This Court rejected the view that an "expert opinion" is "not fact" and is "mere speculation rather than evidence." *Id.* at 464. "The substantial-evidence rule," the Court explained, "is no different because the questions involve matters of scientific knowledge and the evidence consists largely of the opinion of experts." *Id.* at 466 (brackets and citation omitted).

Nothing in *Florida Power & Light* suggests that the vocational testimony here does not constitute substantial evidence of the existence of significant numbers of jobs in the national economy that petitioner could perform. *Florida Power & Light* made clear that the sufficiency of the type of scientific expert opinion before the Court had been "so long accepted" that it was not

"fairly in dispute" that such evidence would qualify as substantial evidence. 404 U.S. at 465-466. That decision *upholding* an agency's finding under "the substantial-evidence test" based on a "long accepted" practice of relying on expert opinion, *id.* at 465, 467, affirmatively supports the result in this case.

D. The Vocational Expert's Hearing Testimony In This Case Constitutes Substantial Evidence Supporting The ALJ's Factfinding

Under the proper formulation of the substantial-evidence standard of judicial review, the administrative record in this case contains sufficient evidence to support the ALJ's finding that jobs suitable for petitioner existed in significant numbers in the national economy.

The agency record contains the hearing testimony of an impartial vocational expert (O'Callaghan) that directly supports the ALJ's factual finding. Petitioner neither objected to O'Callaghan providing expert testimony nor questioned her expert qualifications. See p. 12, *supra*. The vocational expert testified, and the ALJ found, that sedentary unskilled occupations suitable for petitioner's functional limitations included work as a "bench assembler" and "sorter," which respectively reflected approximately 240,000 and 120,000 jobs nationwide. Pet. App. 111a-112a; *id.* at 116a (A.R. 857); see pp. 12-13, *supra*. The vocational expert further testified that bench-assembler and sorter positions required a worker to stay on task no less than 80% of the workday. A.R. 863-865; see p. 14, *supra*. At a minimum, that expert testimony, which O'Callaghan based in part on her vocational-rehabilitation experience and was subject to cross-examination, has the "rational probative force" necessary to constitute substantial evidence of a significant number of jobs in the national economy

that petitioner could perform. *Perales*, 402 U.S. at 407-408 (quoting *Consolidated Edison*, 305 U.S. at 230).

Moreover, the significance of the expert testimony supplied by O'Callaghan was enhanced by the opinion of petitioner's own vocational expert (Knutson), which petitioner offered in response. Knutson, who had himself served as a SSA vocational expert for nearly 20 years, directly responded to one of the three illustrative sedentary jobs that O'Callaghan had identified. See pp. 15-16, *supra*. But Knutson's opinion conspicuously failed to discuss—let alone challenge—O'Callaghan's description of, and her job numbers for, the bench assembler and sorter positions. See p. 16, *supra*. Nor did Knutson discuss or dispute the minimum time on-task required for those jobs. See *ibid*. Those omissions by petitioner's own experienced expert itself indirectly supports the reliability of O'Callaghan's expert testimony on which ALJ relied.

Especially given the long-established practice of relying on the testimony of vocational experts like O'Callaghan (and Knutson) in social security disability hearings, the evidence in the administrative record in this case is "sufficien[t]" evidence that "a reasonable mind might accept as adequate to support" the ALJ's factual finding of the availability of relevant work in the national economy. See *Consolidated Edison*, 305 U.S. at 229 (emphasis omitted). It is much more than a "mere scintilla," *ibid.*, and it is far removed from the kind of evidentiary material lacking any "rational probative force" that would be insufficient to constitute "substantial evidence," *Perales*, 402 U.S. at 407 (quoting *Consolidated Edison*, 305 U.S. at 230). There is no contrary evidence in the record, much less anything "so compel-

ling" that "a reasonable factfinder would have to conclude" that O'Callaghan's expert testimony was incorrect. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481, 483-484 (1992) (citing *Columbian Enameling*, 306 U.S. at 300). A reasonable factfinder confronted with such an evidentiary record could rationally find that bench assembler and sorter positions exist in roughly the numbers that O'Callaghan described, and in any event could determine that jobs suitable for petitioner existed in significant numbers in the national economy. In short, the ALJ's factfinding is "supported by substantial evidence" and therefore "conclusive" on judicial review. 42 U.S.C. 405(g).

II. THE ADMINISTRATIVE PROCEEDINGS IN THIS CASE WERE FAIR AND DID NOT VIOLATE ANY PROCEDURAL REQUIREMENTS IMPOSED BY LAW

Although petitioner frames his legal arguments as addressing whether "substantial evidence" supports the ALJ's factfinding, the premise for his position is ultimately a procedural one: The vocational expert "fail[ed] upon [petitioner's] request to provide the underlying data on which [the expert's] testimony is premised." Pet. i. Any such failure, however, stemmed not from the expert's own refusal to supply requested documents from her files, but from the ALJ's two procedural rulings during petitioner's disability hearing not to require the production of such documents. Pet. App. 118a-119a (A.R. 865, 870). Petitioner states (Br. 29) that a "procedural mechanism[]" for "[r]equiring the production of underlying data upon request" by a claimant should be made available to facilitate the "probing [of vocational experts'] conclusions." Those "procedures," in peti-

tioner's view (Br. 29, 41), are required to make the proceedings "fundamentally fair" and increase the reliability of the disability evaluation process.

Those contentions lack merit. The administrative proceedings in this case were fair and did not violate any procedural requirement imposed by law. As explained below, the testimony of impartial vocational experts under long-established practice is inherently reliable; SSA's existing administrative process, which gives claimants the right to cross-examine such experts and submit other relevant evidence, is a fair procedure for testing a vocational expert's testimony; and petitioner's discovery-on-demand rule would be an impractical and unduly burdensome procedure in this context.

The Court's consideration of those issues, however, may be frustrated by the manner in which this case has come to the Court. First, the court of appeals rejected petitioner's "substantial evidence" argument without addressing procedural due process or any other asserted source of procedural law. Pet. App. 20a-22a; see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). Second, petitioner sought certiorari to resolve an asserted disagreement over the meaning of the substantial-evidence test, Pet. 12-19, and accordingly presented only a "substantial evidence" question for the Court's review, Pet. i. Yet the substantial-evidence test for the sufficiency of an agency's evidentiary record is legally independent and distinct from the procedures for assembling and designating that record. See pp. 24-32, *supra*. Finally, petitioner has not once mentioned "due process" in his briefs in this Court nor identified any statutory or regulatory provision requiring his suggested procedure. Those factors appear to render this case an unsuitable

one in which to fully explore in the first instance such procedural matters, even if they are regarded as "related" or "complementary" to the substantial-evidence question presented to the Court. See *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (A subsidiary question must be "fairly included" in the question presented.) (citations and emphases omitted). In any event, petitioners' contentions are without merit.

A. Vocational Experts' Expertise And Impartiality Make Their Testimony Presumptively Reliable

As with the opinions of the physicians at issue in *Perales*, the expertise and impartiality of vocational experts make their opinions presumptively reliable. Vocational experts are practitioners with expertise in "placing adult workers, including those with disabilities, into jobs" and the "[w]orking conditions and physical demands of various occupations," as well as "[k]nowledge of the existence and numbers of jobs at all exertional levels." HALLEX I-2-1-31.B.1. The purpose of obtaining the testimony of these unbiased professionals is to secure an impartial and realistic assessment of whether someone with the claimant's vocational background and residual functional capacity would be able to do work that exists in significant numbers in the national economy. As the resumes of the two experts in this case reflect, A.R. 1274, 1293, such experts frequently work in the community in the field of vocational rehabilitation and therefore have private clients for whom they provide services. It is such practical experience helping disabled workers in vocational contexts that can make vocational experts particularly valuable in evaluating whether a claimant has satisfied the statutory definition of disability.

SSA has established criteria specifying the overall education and experience for an individual in order to qualify as a vocational expert. See p. 6, *supra*. SSA's subsequent selection of vocational experts for particular ALJ hearings off a rotating roster (subject to their availability), and its payment of fees based only on the services they furnish, see pp. 6-7, *supra*, provide structural protections that safeguard impartiality. See *Perales*, 402 U.S. at 403 (fee paid to medical expert as "recompense for [the expert's] time and talent" provides no basis for "ascrib[ing] bias" to their opinions). The agency's own role as "an adjudicator and not as an advocate or adversary" further contributes to the "reliability and impartiality" in their expert opinions. *Ibid.* And each claimant is given the opportunity at the hearing both to probe and to object to the qualifications and impartiality of the particular expert selected to provide testimony in his case. See p. 7, *supra*. Petitioner did not object to or dispute the expertise or impartiality of the vocational expert here.

Although petitioner contends (Br. 36, 49-52) that a vocational expert's impartiality, credibility, and professional experience have "little bearing" on the reliability of the expert's testimony about the availability of jobs, this Court concluded in *Perales* that such factors enhance the reliability of expert evidence in SSA disability hearings, even when the expert is *not* cross-examined in the hearing. See 402 U.S. at 402-404 (including the "impartiality," "independen[ce]," and "professional" opinion of medical experts as factors that "assure underlying reliability"). Likewise, under the Federal Rules of Evidence, "experience alone—or experience in conjunction with other knowledge, skill, training or education"

—can "provide sufficient foundation for expert testimony." Fed. R. Evid. 702 advisory committee's note (2000 amendments); cf. *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 156 (1999) ("[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

B. Claimants Can Effectively Probe The Testimony Of Vocational Experts Through Cross-Examination

Once an impartial vocational expert has testified about jobs that can be performed by a person described in the hypotheticals posed by the ALJ based on the claimant's alleged impairments, the claimant has the opportunity to probe the reliability of that testimony through cross-examination. The "reliability" of testimonial evidence is properly tested "in the crucible of cross-examination." *Crawford* v. *Washington*, 541 U.S. 36, 61 (2004). Indeed, petitioner acknowledges that cross-examination is "[t]he age old tool for ferreting out truth." Br. 45 (citation omitted). Cf. *Dowling* v. *United States*, 493 U.S. 342, 353 (1990) (rejecting contention that it is "fundamentally unfair" to admit evidence alleged to be "inherently unreliable," because the defendant "had the opportunity to refute it" and the factfinder could then "assess the truthfulness and the significance" of the testimony).

The cross-examination procedure does not, as petitioner suggests (Br. 48), shift to the claimant an evidentiary burden that should be borne by the agency. At step five of SSA's sequential evaluation process, the agency bears the burden of producing evidence of jobs that the claimant could perform and that exist in substantial numbers in the national economy. As petitioner acknowledges (*ibid.*), the agency accepts that burden so that a claimant does not have to prove "a broad negative

proposition about the absence of suitable alternative work in the labor market." 68 Fed. Reg. 51,153, 51,155 (Aug. 26, 2003) (explaining that the claimant does not have to "produce vocational evidence showing that there are no jobs in the national economy that [the claimant] can perform"). The agency meets that burden when, through a vocational expert, it identifies jobs that a person with the claimant's limitations could perform. At that point, the claimant is not being asked to "prove a broad negative proposition about the absence of suitable alternative work in the labor market." Pet. Br. 48 (citation omitted). Instead, the vocational expert has provided estimates with respect to the availability of the specified jobs, which the claimant may probe through cross-examination.

Like petitioner, most claimants are represented by counsel at ALJ hearings.[8] The ALJ can reasonably rely on the claimant's attorney to adequately probe the bases for any potentially questionable vocational-expert testimony through cross-examination. The public jobs data that vocational experts utilize are available and "familiar to * * * claimants' representatives," who successfully use them "to rebut contrary [expert] testimony." National Ass'n of Disability Representatives

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[8] See *Social Security's Processing of Attorney Fees: Hearing Before the Subcom. on Social Security of the House Comm. on Ways and Means*, 107th Cong., 1st Sess. 50 (May 17, 2001) (testimony by Executive Director, National Organization of Social Security Claimants' Representatives (NOSSCR), that 74.9% of SSDI claimants were represented by an attorney in FY 2000); NOSSCR Amicus Br. 1 (similar). Because petitioner was represented by counsel, this case does not present any question whether an ALJ has an independent duty to probe the testimony of a vocational expert when a claimant is unrepresented.

Amicus Br. 12-13. Here, however, nothing in petitioner's cross-examination of the vocational expert gave the ALJ reason to question the reliability of her testimony. See pp. 13-15, *supra*.

Petitioner asserts (Br. 46-47) that, without obtaining documents that may have informed the vocational expert's opinion, a claimant "cannot probe the basic question * * * of whether the expert's conclusions flow from a coherent analysis of reliable data sources" or determine if the opinion has been conjured "out of whole cloth." That is wrong. Such matters may be explored by asking questions to ascertain the expert's logic, mode of analysis, and information sources underlying her conclusions. Yet after making only a very preliminary inquiry, petitioner's counsel never even asked the expert about her methodology or the sources of information informing her testimony, or challenged the vocational expert with different evidence. See pp. 13-16, *supra*.

When the vocational expert, for instance, stated that she based her testimony that sorters and bench assemblers must stay on task at least 80% of the workday on her professional experience, including talking to employers and doing job analyses, petitioner's counsel never explored the issue beyond asking for copies of her job analyses. See pp. 14-15, *supra*. Counsel never asked about the types of analyses that the expert performed; what specific categories of information any written analyses might contain; or what methodology and sources of data the expert used in doing those analyses. If the vocational expert could not have persuasively answered probing questions about the foundation for her testimony to the ALJ's satisfaction, or if her responses included conflicting testimony, the cross-examination could have developed testimonial evidence

in the administrative hearing record that itself might have undermined the reliability of the expert's conclusions. In those circumstances, the record evidence might have been such that no "reasonable mind" could have found it "adequate to support"—*i.e.*, substantial evidence for—the expert opinion on which the ALJ relied. *Consolidated Edison*, 305 U.S. at 229. See, *e.g.*, *Chavez* v. *Berryhill*, 895 F.3d 962, 966-967, 969-970 (7th Cir. 2018) (discussing ALJ's probing examination that sufficiently undermined the vocational expert's conclusions). Petitioner opted never to explore such lines of inquiry.

In fact, petitioner's counsel failed even to ascertain whether any set of actual written analyses would likely shed meaningful light on the vocational expert's on-task testimony. The expert testified that her testimony was based in part on the "experience" she obtained in "*doing* job analysis." Pet. App. 117a-118a (A.R. 865) (emphasis added); accord A.R. 866 ("experience doing job analysis"); see p. 14, *supra*. She did not specifically testify that she relied for her testimony in this case on information in any particular written analyses, as petitioner's counsel appears to have assumed in asking her to "provide those job analys[e]s," Pet. App. 118a (A.R. 865).

Petitioner's counsel similarly failed to use cross-examination to probe the expert's testimony that 240,000 and 3000 bench-assembler jobs and 120,000 and 1500 sorter jobs existed in the national economy and Southeastern Michigan, respectively. Pet. App. 116a (A.R. 857). After the expert explained that she based those numbers on BLS data as well as her "own individual labor market surveys," counsel merely asked the expert to "provide [her] own" surveys. *Id.* at 119a (A.R. 869). Counsel never requested the relevant BLS data,

inquired further about such data or the vocational expert's evaluation of it, or asked about the nature of the individual labor market surveys she performed. Nor did counsel ask whether the Michigan-based expert's nationwide numbers were based on BLS's nationwide data rather than the expert's own possibly local surveys.[9]

When a claimant introduces evidence into the hearing record—either from the vocational expert herself on cross-examination or from some other evidentiary source—that calls the expert's initial testimony into

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[9] Petitioner's amici attempt to do in briefing in this Court what petitioner did not do at the hearing: contest the reliability of the vocational expert's testimony through competing data. NOSSCR Amicus Br. 6-8. NOSSCR suggests (Br. 6 & n.5) that when vocational expert O'Callaghan testified about the number of "sorter" jobs, she was referring only to the subset of jobs identified in the *Dictionary* under the specific numerical code for an agricultural "nut sorter." NOSSCR similarly suggests (Br. 7 & n.15) that when the expert testified about the number of "bench assembler" jobs, she was referring only to the subset of jobs identified under the *Dictionary* code for a "final assembler" of optical frames. NOSSCR then argues (Br. 6-8) that the experts' projections in this case differ from those offered by vocational experts in other cases. Petitioner's counsel did not raise such issues in his cross-examination of the expert, perhaps because counsel understood that the *Dictionary* codes that the expert cited in this case were merely "representative"—that is, illustrative—of the broader categories of "sorter" and "bench assembler" to which her job projections applied. See Pet. App. 116a (expert's explanation that she provided "representative" codes from the *Dictionary*). Had counsel asked the expert to explain how she developed her estimates, the expert would have then provided an answer. NOSSCR's argument thus underscores the point that claimants are free to use publicly available data when probing the basis for a vocational expert's testimony. Here, petitioner's counsel did not do so, and thus gave the ALJ no reason to conclude that the estimates given by the vocational expert were unreliable.

question, the claimant can produce a conflict that the ALJ must resolve. In *Buck* v. *Berryhill*, 869 F.3d 1040 (2017), for example, the Ninth Circuit concluded that "the vast discrepancy between the [vocational expert's] job numbers and those tendered by [the claimant], presumably from the same source, [wa]s simply too striking to be ignored." *Id.* at 1052. But where, as here, the claimant fails to utilize cross-examination to probe the basis for the expert's testimony and otherwise fails to submit evidence undermining that testimony, "a [vocational expert's] testimony is one type of job information that is regarded as inherently reliable" in "the absence of [such] contrary evidence," and accordingly can constitute substantial evidence for the agency's decision. *Id.* at 1051.

C. Claimants Can Submit Rebuttal Evidence, Including From A Vocational Expert

Another procedural tool available to claimants is the option to submit rebuttal evidence, including an opinion from a different vocational expert. In this case, for example, petitioner obtained a rebuttal opinion from vocational expert Knutson (A.R. 1297-1298) and submitted it with an accompanying letter brief (A.R. 1290-1292) to argue his case to the ALJ.

Knutson's opinion, however, did not address two of the three sedentary-level jobs (bench assembler and sorter) that vocational expert O'Callaghan had identified as available in significant numbers in the national economy and the region in which petitioner lived. The only sedentary-level job that Knutson's opinion addressed was that of surveillance system monitor. A.R. 1297; see p. 16, *supra*. The ALJ accordingly credited the aspects of O'Callaghan's testimony that were left unrebutted and did not rely on the particular aspect of

her testimony that Knutson had called into question. Pet. App. 111a-112a. As explained above, this course of the proceedings reinforces the conclusion that O'Callaghan's unrebutted testimony supplied substantial evidence for the ALJ's finding that petitioner was able to perform substantial gainful work that existed in the national economy. See pp. 40-42, *supra*.

D. Petitioner's Proposed Rule Would Be Impractical And Unduly Burdensome

Petitioner's desire to require upon request automatic production of any documentary materials that may inform a vocational expert's opinion would be impractical and burdensome for multiple reasons.

First, as petitioner acknowledges (Br. 12), a vocational expert does not know in advance what hypothetical questions an ALJ will pose. Such questions are intended to address the potential range of the claimant's residual functional capacity, which an ALJ ordinarily will not have specifically determined in advance of a hearing. A vocational expert who appears in person at a hearing therefore would be unlikely to be able to have available for the hearing all potentially relevant documents developed in the course of her professional work.

Nor is it realistic to suppose (Pet. Br. 40) that an expert could gather her privately generated files during a brief hearing recess. As this case illustrates, SSA hearings are frequently tightly scheduled. See p. 15, *supra*. Recesses would likely result in continuances, significantly increasing the adjudicatory burdens on the agency. SSA already holds a vast number of hearings (approximately 670,000 annually from FY2014-FY2017) and "[o]ver 1 million people are waiting an average of 605 days [just] for an answer on their hearing request."

2018 SSA Report 6, 35. Given that ALJs found claimants to be disabled in 47% of the cases that they decided in FY2017,[10] such delays can have a significant adverse effect on the timing of the benefit payments needed by disabled claimants. Cf. *Califano* v. *Boles*, 443 U.S. 282, 285 (1979) (noting this Court's "sensitiv[ity] to the special difficulties presented by the mass administration of the social security system," which, given the "magnitude of that task," "is not amenable to the full trappings of the adversary process lest again benefit levels be threatened by the costs of administration").[11]

Finally, petitioner contends (Br. 5-6, 55) that SSA's experience within the Seventh Circuit after that court's 2002 decision in *Donahue* shows that requiring vocational experts to furnish documentary materials upon request is a "rule [that] works" and will not "delay or disrupt social security disability hearings." That is incorrect. This Office has been informed by SSA that the rule petitioner ascribes to *Donahue* has not been implemented by the agency within the Seventh Circuit, as SSA has not issued an acquiescence ruling for *Donahue* or its progeny. See 20 C.F.R. 404.985(b), 416.1485(b).

The Seventh Circuit in *Donahue* stated that "[i]f the basis of the vocational expert's conclusions *is* questioned at the hearing," the "ALJ should make an inquiry

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[10] SSA, *FY 2019 Congressional Justification* 206, https://www.ssa.gov/budget/FY19Files/2019CJ.pdf.

[11] Reducing the backlog of hearings is one of SSA's top priorities. *2018 SSA Report* 6. In FY2017, the agency began reducing the number of cases awaiting disability hearings, and SSA has since updated its plan to utilize "special funding that Congress provided to address the backlog." *Id.* at 6-7; see *id.* at 36; cf. *Heckler* v. *Day*, 467 U.S. 104, 112 (1984) (noting the longstanding "[c]ongressional concern over timely resolution of disputed disability claims").

(similar though not necessarily identical to that [concerning the admissibility of expert opinion testimony] in [Federal] Rule [of Evidence] 702) to find out whether the purported expert's conclusions are reliable." *Donahue*, 279 F.3d at 446. But that statement was dicta because the court held that "ALJ was entitled to reach the conclusion she did" because the claimant's counsel questioned the expert's testimony "only after the hearing." *Id.* at 447. After *Donahue*, the Seventh Circuit has rendered only one precedential decision finding error in an ALJ's failure to direct a vocational expert to produce supporting materials. See *McKinnie* v. *Barnhart*, 368 F.3d 907, 911 (2004) (per curiam). And *McKinnie*'s fact-bound reasoning based on the expert's "vague" responses that were "insufficient to establish a foundation for her testimony," *ibid.*, did not itself conflict with SSA policy. Since then, the Seventh Circuit has encouraged claimants' counsel to "cooperate" with ALJs to allow information underlying an expert's testimony to be considered but has "refuse[d] to endorse a system that drags out every Social Security hearing to an interminable length." *Britton* v. *Astrue*, 521 F.3d 799, 804 (2008) (per curiam); cf. *Liskowitz* v. *Astrue*, 559 F.3d 736, 745 (7th Cir. 2009) (declining a claimant's "invitation to impose impossible burdens on the [vocational expert]"). As a result, the significance of the *Donahue* line of cases even in the Seventh Circuit remains unclear.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. 42 U.S.C. 405 provides in pertinent part:

Evidence, procedure, and certification for payments

(a) Rules and regulations; procedures

The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

(b) Administrative determination of entitlement to benefits; findings of fact; hearings; investigations; evidentiary hearings in reconsiderations of disability benefit terminations; subsequent applications

(1) The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the

evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure.

* * * * *

(g) Judicial review

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to

which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the

Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

(h) Finality of Commissioner's decision

The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No ac-

tion against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

* * * * *

3. 42 U.S.C. 1383 provides in pertinent part:

Procedure for payment of benefits

* * * * *

(c) Hearing to determine eligibility or amount of benefits; subsequent application; time within which to request hearing; time for determinations of Commissioner pursuant to hearing; judicial review

(1)(A) The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. The Commissioner of Social Security shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hear-

ing on the matter in disagreement within sixty days after notice of such determination is received, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing affirm, modify, or reverse the Commissioner's findings of fact and such decision. The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under the rules of evidence applicable to court procedure. The Commissioner of Social Security shall specifically take into account any physical, mental, educational, or linguistic limitation of such individual (including any lack of facility with the English language) in determining, with respect to the eligibility of such individual for benefits under this subchapter, whether such individual acted in good faith or was at fault, and in determining fraud, deception, or intent.

* * * * *

(3) The final determination of the Commissioner of Social Security after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Commissioner's final determinations under section 405 of this title.

(d) Procedures applicable; prohibition on assignment of payments; representation of claimants; maximum fees; penalties for violations

(1) The provisions of section 407 of this title and subsections (a), (d), and (e) of section 405 of this title shall apply with respect to this part to the same extent as they apply in the case of subchapter II of this chapter.

* * * * *

No. 17-1184

IN THE
Supreme Court of the United States

MICHAEL J. BIESTEK,
Petitioner,

v.

COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

This Court granted certiorari to consider whether the testimony of a vocational expert, alone, can constitute substantial evidence of "other work" available to a social security disability benefits applicant when the expert refuses upon request to provide the data upon which her testimony is premised. The answer to that question is no. This Court's case law, both in the social security context and elsewhere, instructs that an expert's testimony must have evidentiary support and be subject to meaningful cross-examination to constitute "substantial evidence." When an expert testifies that a specific number of jobs exists, at a specific time, in a specific location, but then refuses to provide the data she concedes she relied upon in forming these conclusions, neither of this Court's basic requirements is met. Conclusory testimony paired with the refusal to provide data that allegedly form the basis for that testimony cannot constitute substantial evidence in support of an agency's determination.

The government spends little time addressing the actual question presented, *see* Gov't Br. 40–42, 44–46, and provides no persuasive explanation for how a vocational expert's unsupported testimony can constitute substantial evidence regarding dynamic job markets. *First*, the vocational expert's experience and the fact that Petitioner did not object to her qualifications, *see id.* at 40–41, 44–46, provide no evidentiary basis for the expert's data-driven testimony regarding the existence of specific jobs, in specific numbers, at specific times, in specific places. *Second*, that Petitioner's counsel could cross-examine the expert,

see id. at 48–49, does not transform a record lacking substantial evidence into one with a sufficient evidentiary basis. This is the case both because the agency bears the burden of demonstrating the existence of a significant number of jobs available to an applicant, and because a refusal to provide access to data upon which an expert's testimony is based deprives an applicant of the material necessary for an effective cross-examination. *Third*, an applicant's ability to "submit rebuttal evidence," *see id.* at 51, likewise cannot fulfill the agency's burden to provide substantial evidence of other work. *Id.* at 41. That is all the more so here where Petitioner's rebuttal expert "failed to discuss" the vocational expert's job numbers. *Id.* The government never explains how a deficiency in its own expert's testimony can be "indirectly support[ed]" by the testimony of another expert who never addresses the issue at all. *Id.*

The government devotes the majority of its brief not to addressing the question presented but to rebutting an argument it acknowledges Petitioner is not making. The government argues at length against a free-standing procedural rule under which a vocational expert would always have to produce upon request the data underlying her testimony in order for a court to affirm an ALJ's benefits determination under substantial evidence review. *See id.* at 26–40.

This Court need not address the merits of this rule because Petitioner is not advocating for it. When the only information in the record regarding dynamic job markets is the conclusions of an expert coupled with the expert's refusal to produce the data underlying those

conclusions, the substantial evidence standard is not met. But that is not a "procedural" rule, requiring in every case the provision of a "document-on-demand." *Id.* at 31. Rather, it is a substantive judgment concerning the quality and quantity of evidence in the agency record. The Seventh Circuit has never held—and Petitioner has never argued—that if a record contains both the unsupported testimony of the expert *and* independent evidence substantiating the expert's testimony, an applicant could still make a free-standing procedural due process objection because the expert failed to provide the data upon which she relied. *That* would be a procedural rule, providing an avenue for relief independent of the record before the agency. As the government acknowledges, Petitioner does not ask the Court to adopt such a rule. *Id.* at 35

Finally, the government's administrability arguments ring hollow. *See id.* at 52–54. In opposing certiorari the government cited the SSA's *Vocational Expert Handbook*[1] which, it claimed, would render this case of "limited prospective importance" because the *Handbook* already instructed vocational experts to "have available, at the hearing, any vocational resource materials [on which they] are likely to rely." BIO 18 (quoting *Handbook* at 18) (alteration in original). In its merits brief, the government fails to even cite the *Handbook* and now claims its policies would be "impractical and unduly burdensome." Gov't Br. 52. Yet social security applications are not processed any slower

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[1] SSA, *Vocational Expert Handbook* (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf

in the Seventh Circuit than nationwide, *see* NOSSCR Amicus Br. 13 n.27, and the facts as they have existed in that circuit since 2002 undercut the government's workability arguments.

Stripped of its newfound administrability concern, the government's brief fails to address the underlying problem presented by its position: The only way an expert could testify that 1,500 sorter jobs existed in Southeast Michigan between October 2009 and May 2013—and that this number would erode between 20 and 30 percent when the jobs are limited to a below-sedentary exertion level—is for the expert to conduct a data-driven job market survey. If this survey already exists, the government provides little justification for why it should not be produced upon demand. If the survey does not exist, then how can an expert reliably opine on the specific number of sorter jobs that existed between 2009 and 2013 in Southeast Michigan? The government provides no answer.

ARGUMENT

I. THE TESTIMONY OF A VOCATIONAL EXPERT CANNOT CONSTITUTE SUBSTANTIAL EVIDENCE OF OTHER WORK WHEN THE EXPERT REFUSES TO PROVIDE THE DATA UPON WHICH HER TESTIMONY IS BASED.

A. Substantial Evidence Demands More Than Bottom-Line Conclusions For Which The Expert Refuses To Provide Support.

The Seventh Circuit's rule rests on the bedrock principle that "[e]vidence is not 'substantial' if vital testimony has been conjured out of whole cloth." *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002). Thus, "an expert is free to give a bottom line, provided that the underlying data and reasoning are available on demand." *Id.* If an expert refuses to provide the data, the expert's testimony is not stricken from the record. Rather, without the underlying data, a court cannot find substantial evidence that "a significant number of jobs were available to [the applicant]" based on the unsupported testimony alone. *McKinnie v. Barnhart*, 368 F.3d 907, 911 (7th Cir. 2004).

The Seventh Circuit's rule vindicates this Court's instruction that substantial evidence requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938); *see* Pet. Br. 21–30. An expert who provides specific, data-driven

testimony, but then refuses to provide to the applicant and the agency the very data she acknowledges form the basis for her testimony, has failed to provide "evidence having rational probative force" as this Court requires. *Consol. Edison*, 305 U.S. at 230.

The government does not cite a single decision of this Court in which an expert witness's unsubstantiated claims about data have been deemed "substantial evidence," let alone when the expert identified but then refused to provide the data underlying her claims. The government claims *Federal Power Commission v. Florida Power & Light Co.*, 404 U.S. 453 (1972), supports its position. Gov't Br. 39–40. Not so. *Florida Power & Light* was the exceptional case in which expert testimony concerning facts regarding the "elusive nature of electrons" for which "experimental evidence . . . [is] practically unobtainable" could, alone, constitute substantial evidence. 404 U.S. at 466–67. Surveys regarding the number of bench assembler jobs in Southeast Michigan between 2009 and 2013—that the vocational expert claimed to possess and rely upon—bear no resemblance to complex physics experiments that, "if they are feasible at all[,] would take one to two years to conduct." *Id.* at 467–68 (footnote omitted).

A simple example demonstrates the incongruence of the government's position. If a vocational expert testified that there existed 1,500 sorter positions in Southeast Michigan and, when asked for the basis of this testimony, responded, "I have a source, but I just don't feel like identifying it or sharing it with you," surely the government would not claim the expert's testimony alone could constitute substantial evidence upon which

an ALJ could base a benefits determination. Regardless of the witness's tenure as a vocational expert, the blanket refusal to provide any numerical basis for the testimony undercuts the testimony's reliability and probative value. In much the same way, while a police officer's general experience might aid him in determining whether probable cause exists that a crime has been committed, *see Ornelas v. United States*, 517 U.S. 690, 700 (1996), no court would accept an officer's testimony that a suspect had a 0.08% blood alcohol concentration absent an officer conducting a breathalyzer examination and providing the court with test results evidencing that conclusion. These hypotheticals demonstrate a basic proposition: when an expert testifies regarding the results of a data-driven analysis and is questioned regarding that analysis, a court or agency cannot reasonably rely on the testimony absent provision of the analysis or data itself.

B. The Government Provides No Persuasive Justification For Why The Testimony Of A Vocational Expert Constitutes Substantial Evidence, When The Expert Refuses To Provide Her Underlying Data.

The government does not even attempt to justify the expert's purported confidentiality rationale for refusing to provide her data, nor does the government explain why the myriad means of protecting sensitive information, used in agency proceedings and federal courts every day, would not have been a viable option here. *See* Pet. Br. at 53–54. Rather, the government identifies three reasons why the substantial evidence

standard is met when a vocational expert testifies regarding the specific number of jobs available to an applicant but then refuses to provide the data upon which that testimony is based. None is persuasive.

First, the government argues "[v]ocational experts are practitioners with expertise" and this "expertise and impartiality" makes their testimony "presumptively reliable." Gov't Br. 44. The length of an individual's tenure as a vocational expert, however, says nothing about her success in a particular case at marshaling accurate data sources and correctly applying a valid methodology to calculate the number of available jobs based on various hypotheticals posed by an ALJ. *See* Pet. Br. 49–52. The government claims the agency's "own role as 'an adjudicator and not as an advocate or adversary' further contributes to the 'reliability and impartiality' in their expert opinions." Gov't Br. 45 (quoting *Richardson v. Perales*, 402 U.S. 389, 403 (1971)). But the government never explains why the agency's neutrality means that an expert witness has used accurate data sources and correctly applied a valid methodology. *See* Pet. Br. 49–52.

Moreover, the government's presumption of reliability is especially misplaced here. Criticism of the "reliability of a vocational expert's job numbers, or the evidentiary basis for those numbers" is "familiar and recurring" in the federal courts. *Shaibi v. Berryhill*, 883 F.3d 1102, 1108 (9th Cir. 2017). Then-Judge Posner, in particular, frequently criticized ALJs for relying on "arbitrary estimate[s]" provided by vocational experts, *Herrmann v. Colvin*, 772 F.3d 1110, 1114 (7th Cir. 2014), and experts' "preposterous" methodology resulting in

job estimates "likely . . . to be a fabrication," *Alaura v. Colvin*, 797 F.3d 503, 508 (7th Cir. 2015). *See* NADR Amicus Br. 8 (collecting cases). As the NOSSCR brief demonstrates, the job numbers vocational experts provide when testifying about the exact same category of jobs designated by a representative DOT code vary substantially: from 16,000 to 471,000 jobs for DOT 521.687-086 (O'Callaghan opined 120,000 jobs, Pet. App. 116a) and from 4,800 to 280,160 for DOT 713.687-018 (O'Callaghan opined 240,000, Pet. App. 116a). *See* NOSSCR Amicus Br. 6–8. These considerable ranges demonstrate the subjectivity and imprecision in vocational expert testimony, and the importance of hard data to validate that testimony before an agency can rely upon it.

Second, the government notes that applicants have the opportunity to cross-examine vocational experts and that through this mechanism "[t]he 'reliability' of testimonial evidence is properly tested." Gov't Br. 46. The government posits "[a] vocational expert, for instance, might persuasively answer a claimant's questions on cross-examination about the methodology she employed and might identify the specific publicly available data that she used to create any particular written analysis that may actually have formed the basis for her testimony." *Id* at 31; *see also id.* at 47 (noting claimants can cross-examine experts on "public jobs data that vocational experts utilize").

Petitioner agrees that as a general matter, and when the necessary materials have been provided to a questioner, cross-examination is a critical means of probing a witness's testimony. But the government's

hypotheticals differ from this case in a core respect: the vocational expert here did not rely solely on *publicly available* data, but instead relied on private "individual labor market surveys" that she withheld from Petitioner. Pet. App. 118a–119a. Contrary to the government's claim, Gov't Br. 48, Petitioner did ask the expert from where she obtained her job numbers and her "20 to 30 percent" further reduction of those numbers, Pet. App. 117a. He also requested the "individual labor market surveys" the expert identified. *Id.* at 119a.

In arguing that Petitioner never "asked about the nature of the individual labor market surveys" or "what methodology and sources of data the expert used in doing those analyses," the government apparently recognizes the importance of that very information in assessing the quality of the expert's conclusions. Gov't Br. 48, 50. The government nevertheless fails to explain how cross-examination on these points could be effective or probative absent the underlying data. Even leaving aside the inefficiency inherent in a witness describing data sets and statistical surveys rather than simply producing them, an applicant lacks any means of verifying the validity of the expert's responses. Thus, while the government concedes the relevance of the "specific categories of information any written analyses might contain," *id.* at 48, it never explains why the expert's self-serving description of that information is an acceptable substitute for the provision of the information itself.

Third, the government argues that applicants have the option to "submit rebuttal evidence, including an

opinion from a different vocational expert." *Id.* at 51. This argument ignores the agency's burden of demonstrating a sufficient number of available jobs under step five. The government never demonstrates how conclusory and unsupported testimony, combined with *rebuttal* evidence to the contrary, could somehow sustain the agency's burden. Moreover, in this particular case, Petitioner's expert "did not respond to O'Callaghan's . . . estimated job numbers for [] the bench assembler and sorter positions." *Id.* at 16. Thus, the *only* job numbers in the record were those of the agency's expert which, for the reasons Petitioner has previously discussed, did not constitute substantial evidence.

The government's resort to rebuttal experts is also irreconcilable with the "self-evident" need for "efficiency" in social security proceedings. *Barnhart v. Thomas*, 540 U.S. 20, 29 (2003) (quotation marks omitted). A battle of the experts is the opposite of the efficient and streamlined process Congress designed and this Court has enforced. A rule that in effect requires twice as many witnesses to hold the government to its burden of demonstrating other work available to an applicant is neither legally justified nor practically desirable.

II. THE SEVENTH CIRCUIT'S REJECTION OF UNSUPPORTED VOCATIONAL EXPERT TESTIMONY ENFORCES THE SUBSTANTIAL EVIDENCE STANDARD; IT DOES NOT IMPOSE A PROCEDURAL RULE.

The government acknowledges that Petitioner is not making a procedural due process argument, *see* Gov't Br. 35, and, likewise, recognizes that the court of appeals never addressed such a claim, *id.* at 43. The government nonetheless spends most of its brief rebutting precisely the procedural argument it recognizes is not in this case. Claiming "the premise for [Petitioner's] position is ultimately a procedural one," *id.* at 42, the government asserts that substantial evidence review "is not the means by which a party may challenge agency decisions affecting what evidence may or must be obtained by a party or admitted into the administrative record," *id.* at 28–29. To rule otherwise, the government claims, would introduce a "doctrinal innovation . . . particularly unwarranted here." *Id.* at 36.

The government is responding to an argument Petitioner has never made. The government misunderstands the basic distinction between a procedural rule that provides a basis for relief in every case a procedure is not followed, and a substantive rule that assesses the quality and quantity of evidence in an agency record. Moreover, as this Court's decisions demonstrate, the fact that alternate procedures might cure deficiencies in an agency record does not transform the substantial evidence standard into a rule of procedural due process.

A. Rejecting The Agency's Reliance On A Vocational Expert's Unsupported Testimony Vindicates A Substantive Standard, Not A Procedural Requirement.

As this Court has emphasized, "[t]he categories of substance and procedure are distinct." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). There exists a basic distinction between procedural rules that govern the means through which an evidentiary record is created, and substantive evidentiary standards through which the content of a record is assessed. The basic requirement of procedural due process is "the right to notice and an opportunity to be heard." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). And because a constitutionally mandated procedural right exists by definition in every case, the basis for a procedural due process challenge does not depend on the substantive evidence upon which an underlying decision rests. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 4 (1991) (finding state statute that authorized prejudgment attachment of real estate without prior notice or hearing or other procedural protections violated procedural due process); *Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972) (identifying "minimum requirements" of procedural due process required during parole revocation hearings); *see also Nelson v. Colorado*, 137 S. Ct. 1249, 1257–58 (2017); *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982).[2]

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[2] The same distinction between a substantive challenge and a procedural due process claim exists in cases brought by social

As the government acknowledges, Petitioner is not making a procedural due process argument, and the foregoing examples demonstrate why. If the only evidence in the record regarding the other work available to an applicant is the testimony of a vocational expert who refuses to provide the private data that form the basis for her testimony, the substantial evidence standard is not met. But the agency might be able meet its burden of supplying substantial evidence of other work available to an applicant—even if its expert refuses to produce her underlying data on demand—by introducing other evidence into the record. Thus, in Petitioner's case, had the agency also introduced independent evidence regarding the number of jobs available in Southeast Michigan between 2009 and 2013—whether through surveys and analyses or a different expert who was able to produce her underlying data—a reviewing court could have found substantial evidence supporting the ALJ's finding of other work. Petitioner has never argued that the vocational expert's refusal to provide her underlying data creates a stand-alone procedural objection, rooted in the Constitution, to the denial of benefits in his and every other case regardless of any other evidence in the record. And the Seventh Circuit has never recognized such a free-standing right either.

The government is thus wrong in claiming Petitioner has adopted a "document-on-demand theory of the substantial-evidence test." Gov't Br. 31. If a vocational expert "identif[ies] the specific *publicly available* data

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security applicants in this Court. *See, e.g., Heckler v. Campbell*, 461 U.S. 458, 468–69 (1983).

that she used to create any particular written analysis that may actually have formed the basis for her testimony," *id.* (emphasis added), both an applicant and the ALJ can access that data source to probe and confirm the reliability of the expert's testimony. But that is an entirely different substantive record from one in which the data source upon which the expert relies is secret, is in the expert's possession alone, and can never be reviewed by the ALJ or the applicant.

The government's principal response is to focus *not* on the facts as presented by this case, but on an alternate, hypothetical, scenario. The Seventh Circuit has held that if an applicant "d[oes] not question the basis for the vocational expert's testimony, purely conclusory though that testimony [is]" during the hearing before the ALJ, the applicant "forfeit[s]" a subsequent challenge to the expert's job estimates. *Barrett v. Barnhart*, 355 F.3d 1065, 1067 (7th Cir. 2004). The government claims that when "a claimant in SSA proceedings stays silent" and does not request the data upon which the expert's conclusions are based, "the state of the evidentiary record will be exactly the same" as when the data is requested and the expert refuses to produce it. Gov't Br. at 31. Thus, because it believes the substance of the record is "exactly the same" in both cases, the government claims the Seventh Circuit's rule must be a procedural one. The government's reasoning is wrong for three reasons.

First, the government's argument rests on the premise that there is no difference between a record when an expert is asked for the basis of unsupported conclusions and withholds that information, as compared

with when an expert is not asked for the basis of her testimony at all. But this Court has long recognized that when a party claims that evidence buttresses the testimony provided, but refuses to present that evidence for examination, both the testimony and facts that would be proved by the missing evidence are cast into doubt. *See Clifton v. United States*, 45 U.S. (4 How.) 242, 247–48 (1846) (a party's presentation of less reliable evidence at trial, notwithstanding the party's "possession or power" over "greater" proof, suggests "if the more perfect exposition had been given it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal"); *see also Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."); *Hanson v. Eustace's Lessee*, 43 U.S. (2 How.) 653, 708 (1844).[8]

This principle applies with full force here. The expert *identified* her "private labor market surveys" as supporting her testimony and then refused to provide them even in a redacted form. By relying on the testimony of the expert, while not even attempting to justify her claim that confidentiality precluded the disclosure of her data, the government attempts to satisfy its evidentiary burden through testimony

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[8] This principle applies no less in the context of judicial review of administrative decisions. *See Ala. Power Co. v. Fed. Power Comm'n*, 511 F.2d 383, 391 n.14 (D.C. Cir. 1974) ("[A] party having control of information bearing upon a disputed issue may be given the burden of bringing it forward and suffering an adverse inference from failure to do so."); *see also Saylor v. U.S. Dep't of Agric.*, 723 F.2d 581, 583 (7th Cir. 1983).

without demonstrating that the testimony has "a basis in evidence having rational probative force," *Consol. Edison*, 305 U.S. at 230.

Second, both the Seventh and Ninth Circuits have held that "when a claimant fails entirely to challenge a vocational expert's numbers during administrative proceedings before the agency, the claimant forfeits such a challenge on appeal, at least when that claimant is represented by counsel." *Shaibi*, 883 F.3d at 1109; *see also Barrett*, 355 F.3d at 1067. Whether characterized as forfeiture of an objection, acquiescence in testimony's reliability, or a refusal to allow applicants to raise belatedly a challenge that could have been resolved during the hearing itself, these cases reflect the normal rule that "courts should not topple over administrative decisions unless the administrative body not only has erred, but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

The government itself analogizes the substantial evidence standard to the standard for summary judgment in civil litigation. *See* Gov't Br. 25. That standard specifically distinguishes between situations where material facts are challenged by an opposing party—rendering summary judgment improper—and situations where material facts are undisputed. *See, e.g.*, *Beard v. Banks*, 548 U.S. 521, 527 (2006). The summary judgment standard only reinforces the distinction between a record in which an applicant challenges the basis for a vocational expert's conclusions on an issue for which the agency bears the burden of proof, and a record in which an applicant does not.

Third, the rule that a vocational expert's testimony alone can constitute substantial evidence if unchallenged, but not if challenged, is entirely consistent with the agency's own policies. In a policy interpretation ruling, the agency provided that before relying on a vocational expert's testimony, an ALJ must "[i]dentify and obtain a reasonable explanation for any conflicts between occupational evidence . . . and information in the Dictionary of Occupational Titles." SSR 00-4P, 2000 WL 1898704, at *1 (Dec. 4, 2000) (emphasis added); *See* Pet. Br. 54–55. This policy reflects the reality of the ALJ's role: "Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits." *Sims v. Apfel*, 530 U.S. 103, 110–11 (2000). The government never explains why it has embraced that rule as a matter of policy since 2004 while rejecting it as a matter of law now.

B. This Court Has Long Recognized That The Content Of An Agency's Record Can Be Assessed While Considering The "Procedures" Used To Compile That Record.

As discussed above, Petitioner is not arguing for a free-standing "document-on-demand" rule, Gov't Br. 23, and thus this Court need not determine whether such a rule would transform "a procedural requirement . . . into a touchstone of substantial evidence, regardless of the state of the record." *Id.* at 32–33. But in arguing that the substantial evidence test is "distinct from the procedures for assembling and designating" *id.* at 43, the

record upon which an agency bases its decision, the government ignores this Court's repeated acknowledgment that the mechanisms through which an agency record is created can, and do, impact the content of the record. This recognition does not turn substantial evidence challenges into procedural due process claims.

The government's error in this regard is most clearly seen in its misreading of *Richardson v. Perales*, 402 U.S. 389 (1971). The government claims that beyond briefly "not[ing] the statutory 'substantial evidence' standard" in *Perales*, the "question" this Court "was called upon to answer was 'what procedural due process requires with respect to examining physicians' reports in a social security disability claim hearing.'" Gov't Br. 34 (quoting *Perales*, 402 U.S. at 402). Thus, the government posits, *Perales* says effectively nothing about the extent to which the procedures an agency uses during a hearing can enhance or detract from the substantiality of the evidence supporting the agency's decision.

This characterization is starkly at odds with the *actual* question presented to the Court, by the government as petitioner, in *Perales*: "Whether written reports by physicians of medical examinations they have conducted may constitute substantial evidence to support a finding of non-disability under the Social Security Act, even though oral medical testimony is contrary to the reports and the claimant has objected to the introduction into evidence of the written reports." Pet. Br. at 2, *Richardson v. Perales*, 402 U.S. 389 (1971), 1970 WL 136651. In arguing that the reports and other evidence could constitute substantial evidence, the government discussed the substance of the reports—

including their "probative value" and "reliability," *id.* at 19—at length, *see id.* at 18–28. The government mentioned "due process"—which it now claims was *the* issue *Perales* decided—just once in passing in its opening brief. *See id.* at 16.

Unsurprisingly, given the question presented and the arguments made by the government, *Perales* identified the applicable legal standard—substantial evidence—in Part IV of its opinion, and then applied that standard to the facts of the case in Part V. In so doing, the Court explicitly held in Part V that the written report of the examining physician "may constitute *substantial evidence* supportive of a finding by the hearing examiner adverse to the claimant," and—tracking the substantial evidence argument made by the government—went on to identify various factors that demonstrated the "underlying reliability and probative value" of the expert's testimony. 402 U.S. at 402. The government's claim that *Perales* "rests on procedural due-process grounds, not the sufficiency of the evidence," Gov't Br. 32, is belied not only by the text of this Court's holding, but by the arguments the government made to the Court. "*Perales* addressed not a procedural question of Social Security law but a substantive one: whether reports of examining physicians, despite being hearsay, could constitute substantial evidence supporting an ALJ's disability determination." *Barrett v. Berryhill*, 906 F.3d 340, 342 (5th Cir. 2018).

To be sure, in explaining why the expert's testimony could constitute substantial evidence, the Court addressed the "integrity and fundamental fairness" of

the procedures through which that testimony was developed. *Perales*, 402 U.S. at 410. Thus, the Court noted the medical reports were based upon "personal consultation and personal examination and rested on accepted medical procedure." *Id.* at 403. Likewise, there was "no inconsistency whatsoever" between the reports of the five specialists. *Id.* at 404. And, in contrast with the facts here, the applicant "did not take advantage of the opportunity . . . to request subpoenas for the physicians." *Id.* But discussing the evidence before the ALJ and the procedures through which it was adduced did not transform the Court's analysis of the substantial evidence supporting the ALJ's finding into an entirely distinct ruling on procedural due process. Rather, *Perales* simply demonstrates the reality that the procedures through which a record is compiled are inextricably linked to the substance of the record that results.

The other cases upon which Petitioner relies likewise demonstrate that the "procedures" through which an agency record is compiled are not "legally distinct" from the substance of that record on substantial evidence review. For example, in *Baltimore & Ohio Railroad Co. v. Aberdeen & Rockfish Railroad Co.*, 393 U.S. 87, 91–92 (1968), the Court determined there was "substantial evidence" in the record of the costs attributable to Northern rail lines for the purposes of revenue allocation. The Court explicitly refused to "sanction" the "lax procedure" of simply accepting the blended Northern rail lines' costs, a procedure it found could lead to "discrimination in favor of the North against the South." *Id.* at 92. In highlighting the deficient

procedure that led to a substantively deficient agency record, the Court was *not* addressing a standalone procedural challenge, but rather was acknowledging the reality that the "procedures" through which a record is formed inevitably impact the substantive record created.

NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939), is in accord. In *Columbian Enameling*, the Court found the Board had erroneously concluded that an employer failed to bargain collectively with its employees, in the absence of substantial evidence that the employer "was aware that the Union desired or sought to bargain collectively." *Id.* at 300. In reaching this conclusion, the Court explicitly noted that the deficiency in the record was "pointedly brought to the attention of the Board . . . and no attempt was made to supply the omission." *Id.* at 298. The fact that this Court identified a "procedure"—calling the witnesses to testify—that could have filled the omission in the record did not change the employer's substantial evidence challenge into a procedural due process claim.[4]

Characterizing the provision of the vocational expert's underlying data here as a "procedure" in no way

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[4] In noting that "[b]ecause petitioner was represented by counsel, this case does not present any question whether an ALJ has an independent duty to probe the testimony of a vocational expert when a claimant is unrepresented," Gov't Br. 47 n.8, the government appears to recognize that the substantiality of record evidence is not entirely divorced from the procedures through which a record was constructed. Otherwise, the question of what an ALJ must do for there to be substantial evidence in the record should not hinge on whether the claimant is represented.

diminishes the fact that failing to provide the data detracts from the substantiality of the evidence in the record.

III. THE SEVENTH CIRCUIT'S RULE IS PRACTICAL AND EFFICIENT.

The government concludes by arguing that the rule adopted in the Seventh Circuit is "impractical and burdensome." Gov't Br. 52. That claim is belied by the government's own arguments during the certiorari stage and actual experience in the Seventh Circuit.

First, the government's practicality concerns are surprising given that in its brief in opposition to certiorari the government claimed Petitioner's rule was "not necessary" because the agency already followed it. The government cited to the SSA's 2017 *Vocational Expert Handbook*, which provided that experts "should have available, at the hearing, any vocational resource materials [on which they] are likely to rely"; and "[i]n some cases, the ALJ may ask [them] to provide relevant portions of materials [they] rely upon." BIO 18 (quoting *Handbook* at 37) (alterations in original). The government never explains why it has reversed positions—previously arguing that vocational experts *already* are advised to have available at hearings the materials upon which they rely, yet now arguing that this requirement would be burdensome and impractical. Indeed, the government does not even acknowledge the SSA's *Vocational Expert Handbook* once in its brief.

Second, the government notes that "a vocational expert does not know in advance what hypothetical

questions an ALJ will pose" and thus "would be unlikely to be able to have available for the hearing all potentially relevant documents." Gov't Br. 52. Not only is this statement at odds with the SSA's own requirements as discussed in the *Handbook*, but it ignores the reality of vocational expert testimony. Even if an expert does not know in advance what an ALJ might ask, if asked about a specific number of jobs available for an applicant with a defined set of limitations, the expert *must* have a data-driven basis to answer. If so, the data is by definition available. If the expert is surprised by a question and has no data-driven answer at her fingertips, then the correct response is for the expert to explain that she cannot answer the question, *not* for the expert to provide an answer for which she has no factual basis. The latter cannot possibly be substantial evidence.

Third, the government represents that it has been informed by the SSA that the agency has not issued an acquiescence ruling. *See* Gov't Br. 53. Regardless of the agency's position, district courts within the Seventh Circuit reverse and remand benefits denials when vocational experts refuse upon demand to provide the data that form the basis for the "other work" numbers. *See* Pet. Br. 40 (citing cases). Indeed, the government recognizes that the Seventh Circuit *requires* "the data underlying a VE's testimony ... be available on demand," *Britton v. Astrue*, 521 F.3d 799, 804 (7th Cir. 2008), and thus parties within the Seventh Circuit "cooperate" to "allow information underlying an expert's testimony to be considered," Gov't Br. 54 (quotation marks omitted). Notwithstanding this requirement, processing times for benefits applicants within the

Seventh Circuit fall well within the national average, and indeed seven hearing offices within the Seventh Circuit are in the top half of offices nationwide in processing time. *See* NOSSCR Amicus Br. 13 n.27. The Seventh Circuit's rule has thus advanced, rather than impeded, the objectives of the SSA system.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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No. 17-1184

In the Supreme Court of the United States

MICHAEL J. BIESTEK, PETITIONER

v.

NANCY A. BERRYHILL, ACTING COMMISSIONER, SOCIAL SECURITY ADMINISTRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF DISABILITY REPRESENTATIVES IN SUPPORT OF PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF DISABILITY REPRESENTATIVES IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The National Association of Disability Representatives (NADR) is a nonprofit voluntary membership organization dedicated to advancing the fair and efficient administration of the Nation's disability insurance system.[1] NADR was founded in 2000, and its membership has since

[1] No counsel for a party authored this brief in whole or in part, and no counsel or entity other than *amicus curiae* or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Petitioner's consent to the filing of *amicus* briefs is filed with the Clerk. *Amicus* received Respondent's consent to file this brief by letter and has filed that letter with the Clerk.

grown to more than 600 attorney and non-attorney members across all 50 states. Roughly one-third of NADR's members are former employees of the Social Security Administration (SSA), including administrative law judges (ALJs). Twenty percent of NADR's members are former vocational experts. Collectively, NADR's members act as representatives of Social Security disability claimants in over 100,000 cases each year, both at the agency level and on judicial review. Accordingly, NADR has a substantial interest in safeguarding "the orderly and sympathetic administration" of the Nation's disability insurance system. *Heckler* v. *Day*, 467 U.S. 104, 106 (1984).

SUMMARY OF ARGUMENT

The opportunity to cross-examine a vocational expert (VE) to obtain "a full and true disclosure of the facts" is essential to the "integrity and fundamental fairness" of a disability hearing. *Richardson* v. *Perales*, 402 U.S. 389, 410 (1971). The question presented goes to the heart of a claimant's ability to carry out that critical function: Must the VE disclose the underlying data supporting her conclusions about the claimant's ability to find "other work"? *See* 20 C.F.R. § 404.1520(a)(4)(v).

Amicus agrees with Petitioner that the answer to that question is "yes" *in cases like this one*, where the VE relies on *private* data. In these circumstances, basic principles of procedural fairness require that the claimant have access to the data so he can explore the basis for the VE's opinions. The Sixth Circuit's contrary decision accordingly should be reversed. But because this case is readily resolved on that narrow ground, which applies in a small minority of cases in the Social Security system, the Court need go no further. Given the uncommon facts of this case and the variety of other situations in which a claimant may

plausibly seek data from a VE, *amicus* believes the contours of any disclosure requirement in other circumstances (*e.g.*, those involving VE testimony based on publicly-available data) are better developed in subsequent cases featuring those facts.

A. For more than 50 years, courts have insisted that, when opposing a request for disability benefits, SSA introduce concrete evidence that the claimant can find other work. In response to this repeated judicial prodding, SSA turned to VEs to testify on two key points: (1) the occupations available to the claimant given his limitations and the vocational factors of age, education, and prior work experience and (2) the number of jobs for such occupations that are available in the national economy.

B. This case involves an uncommon fact pattern implicating only the second point. In cases where, as here, a VE cites private data as the foundation for her opinion, a substantial problem arises. Because such data is kept from the claimant and the ALJ, neither has any practical means to ensure the reliability of the VE's testimony. Put another way, neither the ALJ nor the claimant can tell "if vital testimony has been conjured out of whole cloth." *Donahue* v. *Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002).

Petitioner's case illustrates the problem. The VE here testified that she relied on both government data and "[her] own individual labor market surveys" in reaching conclusions about the incidence of jobs Petitioner allegedly could seek. Pet. App. 119a. After the ALJ failed to inquire into the data in those surveys, Petitioner's counsel asked the VE to share the surveys, with redactions as necessary, on cross-examination. *Ibid.* The VE declined, and the ALJ refused to require disclosure of what the VE described as "private confidential files." *Id.* at 118a. Accordingly, neither the ALJ nor Petitioner had the means to

discern whether the private surveys that the VE cited actually supported her testimony that 240,000 bench assembler jobs and 120,000 sorter jobs exist nationally. *Id.* at 111a. The ALJ nevertheless concluded that Petitioner "was capable of making a successful adjustment to other work that existed in significant numbers in the national economy," and, on that potentially unsupported evidentiary basis, denied him essential benefits. *Id.* at 112a; *see also* 20 C.F.R. § 404.1520(a)(4)(v).

The Sixth Circuit's approach in this case incorrectly and unfairly permits a matter of utmost importance to be decided based on flimsy findings grounded in secret data. That approach ignores what essentially every other court of appeals to have considered the issue has agreed upon: The evidence relied upon by an ALJ cannot be "substantial" for purposes of judicial review if it has been "conjured out of whole cloth." *Donahue*, 279 F.3d at 446. By depriving the claimant of access to critical data that is potentially outcome-determinative—and the more basic opportunity to determine whether such data even exists—the decision below insulates a class of VE testimony from any meaningful scrutiny, and so invites increased reliance on undisclosed, private data. This Court should reject that flawed approach and hold that an ALJ must provide access to a VE's private data upon the claimant's request.

But it is unnecessary to go further in deciding this case because the situation described above is the exception, not the rule. In most cases, VEs ground their conclusion as to the number of jobs available to a claimant on government data or two commercially-available compilations of such data. In those circumstances, the ALJ is familiar with these resources and the claimant, at least when represented, can access and examine them. Those (more common) cases are different from this case in multiple

ways. The necessity and scope of any disclosure obligation in those cases is therefore better addressed in one of those cases.

ARGUMENT

UPON A CLAIMANT'S REQUEST, AN ALJ SHOULD ORDER DISCLOSURE OF PRIVATE DATA RELIED ON BY A VOCATIONAL EXPERT.

A. SSA's Reliance On Testimony From Vocational Experts Is A Response To Judicial Insistence That The Agency Rely On Concrete Vocational Evidence.

1. The introduction of VE testimony as an important element in the evaluation of disability claims can be traced to Judge Friendly's opinion in *Kerner* v. *Flemming*, 283 F.2d 916 (2d Cir. 1960). The claimant in *Kerner* had suffered a heart attack and lived with diabetes, but SSA denied disability benefits because he had not shown a "complete inability" to do other work. *Id.* at 918. Interpreting broad statutory language that defined disability (and thus eligibility for SSA benefits) as the inability to engage in "any substantial gainful activity," Judge Friendly concluded that the relevant questions under the statute were "what can applicant do, and what employment opportunities are there for a man who can do only what applicant can do?" *Id.* at 921.

Mere speculation about job opportunities available to the claimant, Judge Friendly held, would not justify denying benefits. In his view, a "[m]ere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available." *Ibid.* In *Kerner*, the agency had offered "nothing save speculation to warrant a finding that an applicant thus handicapped could in fact obtain substantial gainful employment."

Ibid. The court accordingly remanded the case so that the agency could "furnish information as to the employment opportunities . . . , or the lack of them, for persons of plaintiff's skills and limitations." *Id.* at 922.

Beyond rejecting "speculation" as evidence, *Kerner* observed that SSA—not the claimant—was obligated to bring forward concrete evidence concerning the claimant's future employment opportunities. *Id.* at 921. *Kerner* thus represented an early recognition of the now well-accepted principle that Social Security Act proceedings are not adversarial, but reflect "the 'investigatory model.'" Bernard Schwartz, *Administrative Law* 470 (4th ed. 1999) (quoting Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1290 (1975)). Under this non-adversarial approach, "[i]t is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits." *Sims* v. *Apfel*, 530 U.S. 103, 111 (2000) (plurality op.); *see also* 20 C.F.R. § 404.900(b) ("In making a determination or decision in your case, we conduct the administrative review process in an informal, non-adversarial manner."). ALJs thus wear "three hats": They represent the claimant, they represent the government, and then they must make an independent decision. Schwartz, *Administrative Law* at 471 (quoting *Rausch* v. *Gardner*, 267 F. Supp. 4, 6 (E.D. Wis. 1967)).[2]

2. SSA initially, and unsuccessfully, responded to the so-called "*Kerner* criteria" by citing government and industrial studies in disability hearings. 1 David F. Traver, *Social Security Disability Advocate's Handbook* § 1302

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[2] In time, the burden of production with respect to the claimant's job opportunities, at what is now step five of the SSA's sequential evaluation process, was formally shifted to the agency. *See* 20 C.F.R. § 404.1512(b)(3).

(2009). But these attempts floundered as "speculative and theoretical" because they insufficiently accounted for "the claimant's particular and highly individual situation." Social Security Administration, *History of SSA During the Johnson Administration 1963-1968* <tinyurl.com/SSA-history>. In 1962, SSA introduced the VE program and entered into contracts with 600 VEs to provide testimony in its hearings. *Ibid.* Given the "'non-adversary' procedure" of disability hearings, VEs were "expected to remain completely objective and impartial" with the sole goal of "dispassionately contribut[ing] [their] vocational evidence toward an equitable decision." *Ibid.*

By the mid-1960s, SSA "was relying heavily upon the use of vocational experts in adjudicated hearings to supply the proof required to meet its new evidentiary burden in labor market work adjustment cases." Jon C. Dubin, *Overcoming Gridlock:* Campbell *After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs*, 62 Admin. L. Rev. 937, 949 (2010) (hereinafter, "Dubin, *Overcoming Gridlock*"). Not long thereafter, courts noted that "the testimony of a vocational counselor [had become] essential" in disability adjudications, *Garrett* v. *Richardson*, 471 F.2d 598, 604 (8th Cir. 1972), and that SSA "invite[d] reversal" if it proceeded without such testimony or other similar evidence, *Taylor* v. *Weinberger*, 512 F.2d 664, 669 (4th Cir. 1975).

3. Notwithstanding the VE program's origins as a response to judicial criticism about the insufficiency of agency evidence, courts have begun to question the reliability, credibility, and arbitrariness of VE testimony. Indeed, doubts about "the reliability of a vocational expert's job numbers, or the evidentiary basis for those numbers"

have become "familiar and recurring" in the courts of appeals. *Shaibi* v. *Berryhill*, 883 F3d 1102, 1108 (9th Cir. 2017) (collecting cases).

Among the critics, the Seventh Circuit, and then-Judge Posner in particular, have been especially outspoken. *See, e.g.*, *Browning* v. *Colvin*, 766 F3d 702, 709 (7th Cir. 2014) (courts "have no idea [about] the source or accuracy" of VE job incidence data) (Posner, J.); *Herrmann* v. *Colvin*, 772 F3d 1110, 1114 (7th Cir. 2014) (Posner, J.) (faulting ALJ's reliance on an "arbitrary estimate" by VE); *Alaura* v. *Colvin*, 797 F3d 503, 508 (7th Cir. 2015) (Posner, J.) (expressing concern about "preposterous" methodology leading to numbers that "seem[ ] likely, therefore, to be a fabrication"); *Forsythe* v. *Colvin*, 813 F3d 677, 681 (7th Cir. 2016) (Posner, J.) ("It is high time that the Social Security Administration turned its attention to obtaining the needed data."); *see also* Richard A. Posner, *Divergent Paths: The Academy and the Judiciary* 136–37 (2016) ("I am embarrassed to confess that I had never questioned the accuracy of the statistics offered by the vocational expert," as "I discovered to my surprise that there is no reliable source of [job incidence] statistics.").

B. Vocational Experts' Use Of Secret Job Incidence Data Undermines The Fairness And Integrity Of Disability Hearings.

A VE's reliance on private data that was withheld from the ALJ and Petitioner may be uncommon, but it is a substantial problem nonetheless. By refusing to require the disclosure of the VE's evidence, the ALJ deprived both herself and Petitioner of a meaningful opportunity to assess the reliability and credibility of the VE's testimony.

A finding grounded in such untested evidence is not supported by "substantial evidence." 42 U.S.C. § 405(g). But VE testimony more commonly is based on government and otherwise accessible data. This case does not involve such testimony, and so it is not a suitable vehicle for determining the necessity and scope of any disclosure obligation in those circumstances.

1. When VEs identify occupations in response to questions from the ALJ or claimant, they frequently refer to the *Dictionary of Occupational Titles* (DOT). Yet the DOT "describes only job duties and requirements, without also reporting an estimate of how many of those positions exist in the national economy." *Chavez* v. *Berryhill*, 895 F.3d 962, 965 (7th Cir. 2018). That means VEs must look to another resource for job incidence data. And the "basic problem" presented in all cases is that while the DOT focuses on "narrow categories of jobs," government job incidence data is published in "broad categories" that do not contain the necessary granularity. *Forsythe*, 813 F.3d at 681. Each of the resources VEs may draw on to solve this data-matching problem pose different challenges for the ALJ and the claimant in attempting to meaningfully test the reliability of the VE's conclusions.

2. Among the various resources that VEs may draw upon for job incidence data, reliance on undisclosed private data raises the most fundamental concerns about procedural fairness. As Petitioner explains (Br. 46–47), reliance on "private labor market surveys" without disclosure to the ALJ and claimant effectively denies them any opportunity to verify the VE's testimony. Even if the ALJ or claimant is able to question the VE about her methodology and perhaps elicit high-level information about the data itself, neither can obtain a "full and true disclosure of the facts." *Richardson* v. *Perales*, 402 U.S. 389, 410 (1971).

Without access to the data, there is no way to determine whether it supports the VE's conclusion or even exists.

As the petition for certiorari explained (Pet. 12–19), the courts of appeals have been unable to agree on a universal rule that encompasses the variety of situations in which a disability claimant may seek the underlying data allegedly supporting a VE's testimony. But whatever dissonance there may be among the courts of appeals, *see Brault* v. *Soc. Sec. Admin.*, 683 F.3d 443, 449 (2d Cir. 2012), there is consensus on one basic point that permits an easy resolution of this case: Testimony that is "conjured out of whole cloth" cannot amount to substantial evidence for purposes of judicial review. *See Donahue*, 279 F.3d at 446; *see also* Pet. App. 22a ("[I]t is undoubtedly true that vocational expert testimony that is 'conjured out of whole cloth' cannot be considered substantial evidence." (quoting *Donahue*)); *Brault*, 683 F.3d at 450 ("We do *not* hold that an ALJ *never* need question reliability, and we agree with the Seventh Circuit that evidence cannot be substantial if it is 'conjured out of whole cloth.'" (quoting *Donahue*)). Or, as Justice Souter recently put it for the First Circuit, a court should not go to the "extreme" of approving reliance on VE testimony where the VE can do nothing more than identify the resource that she relied upon. *Purdy* v. *Berryhill*, 887 F.3d 7, 16 (1st Cir. 2018).

There is nothing in the record in this case to rule out the possibility that the VE's testimony about her labor market surveys was "conjured out of whole cloth." *Donahue*, 279 F.3d at 446. After the ALJ refused to require disclosure of the data, neither she nor Petitioner could determine whether the surveys that the VE invoked supported her testimony. The VE's labor market surveys *may* be "evidence having rational probative force," *Perales*, 402 U.S. at 407, but it is impossible to know with any

"modicum of confidence," *Chavez*, 895 F.3d at 969.

The ALJ's conclusion that the VE was a credible witness does not solve the problem. *See* Pet. App. 22a. Credibility is not the same as reliability. *See* Pet. Br. 49–51. Whether the VE subjectively believed her own testimony (credibility) does not bear on whether the data actually supported her belief (reliability). As to reliability, it is not necessary that the VE be "consciously lying"—it is enough that the VE, "due to faulty information or observation, ha[d] been mistaken." Charles T. McCormick, *The Borderland of Hearsay*, 39 Yale L.J. 489, 490 (1930). And without disclosure of the VE's data, the ALJ and claimant are unable to discern whether a mistake was made. "Trust without verifying" is not a way to run a system that provides essential benefits to millions of Americans.[3]

Requiring disclosure of only private data avoids that substantial problem without implicating any of the broader complications of drawing on Rule 702 and *Daubert* in attempting to craft a broader disclosure obligation.

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[3] *Amicus* disagrees with the Seventh Circuit's conclusion that a claimant forfeits the ability to challenge the ALJ's reliance on unreliable VE testimony if the issue is not raised at the ALJ hearing. *See Donahue*, 279 F.3d at 446. In the context of SSA's Appeals Council, a plurality of this Court observed that "the adversarial development of issues by parties . . . simply does not exist" because "[t]he Council, not the claimant, has primary responsibility for identifying and developing the issues." *Sims* v. *Apfel*, 530 U.S. 103, 112 (2000). Likewise, "[i]t is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits." *Id.* at 111 (citing *Perales*, 402 U.S. at 400–01). Thus, just as a claimant does not on judicial review waive issues that were not raised before the Council, *id.* at 105, the same should hold true for issues not raised before the ALJ. *See id.* at 107 (reserving ruling on that question). The Court need not address the issue here, however, because Petitioner raised the issue before the ALJ and there is no suggestion of forfeiture.

The Sixth Circuit's contrary decision should therefore be reversed on that narrow ground.

3. Although Petitioner was entitled to disclosure of the VE's private data, other resources relied upon by VEs may implicate different considerations that should be addressed, if at all, in a case that actually involves those issues. *See Brault*, 683 F.3d at 449.

a. In the majority of cases, VEs have relied, at least in part, on third-party commercial compilations of government data. One such resource, *Occupational Employment Quarterly* (OEQ), compiles data from the Bureau of Labor Statistics (BLS) and the Census Bureau to provide "estimates" that are "intended to be used in conjunction with local labor market expertise and research." *See* U.S. Publishing, *Data Source References* <tinyurl.com/USPubOEQ>. VEs routinely rely on the OEQ. *See, e.g.*, *Anders* v. *Berryhill*, 688 F. App'x 514, 522 (10th Cir. 2017); *Herrmann*, 772 F.3d at 1113; *Guiton* v. *Colvin*, 546 F. App'x 137, 141 (4th Cir. 2013); *Liskowitz* v. *Astrue*, 559 F.3d 736, 744 (7th Cir. 2009).

Likewise, in recent years, "Job Browser Pro," a software program, has also gained substantial popularity. VEs often invoke it. *See, e.g.*, *Purdy*, 887 F.3d at 14 (noting Job Browser Pro software has been recognized "to be widely relied upon by vocational experts"). And claimants do too, to rebut contrary VE testimony. *See, e.g.*, *Buck* v. *Berryhill*, 869 F.3d 1040, 1047 (9th Cir. 2017); *Anders* v. *Berryhill*, 688 F. App'x 514, 523 (10th Cir. 2017). Like the OEQ, Job Browser Pro compiles data from BLS and the Census Bureau to create "estimates" of jobs "at the DOT-level," using a methodology disclosed on its website. *See* SkillTRAN, *Job Numbers* <tinyurl.com/SkillTranJBP>.

In the experience of *amicus*'s members, these resources have proved popular among VEs for several reasons. First, these resources translate complicated information into a digestible form—VEs rarely if ever have training in statistics, let alone the high-level facility in statistical analysis needed to distill BLS and census data. *See generally* Dubin, *Overcoming Gridlock* at 968. Second, because these resources are publicly available and are now familiar to ALJs and claimants' representatives, their advantages and shortcomings are well-known, which helps minimize the appearance of unfairness. *See, e.g.*, *Herrmann*, 772 F.3d at 1114 (criticizing OEQ's equal distribution methodology as "arbitrary").

b. The lower courts are in the process of working out the standards that should apply when these resources are used. Some courts have held that it is unnecessary to turn over the underlying data for such commercial compilations where the resource at issue is generally accepted and the VE is able to explain the basics of the resource's methodology. *See, e.g.*, *Purdy*, 887 F.3d at 16–17; *Lesner* v. *Colvin*, No. 12-CV-7201, 2015 WL 5081267, at *8 (N.D. Ill. Aug. 24, 2015) (noting that SkillTRAN is "publicly available labor market software" and thus not "untestable"). Even in these circumstances, the Seventh Circuit has concluded that it is not onerous for VEs to make available the handful of pages of data that they are relying on. *See, e.g.*, *Britton* v. *Astrue*, 521 F.3d 799, 804 (7th Cir. 2008) (concluding that offer to provide "copies of the pages [from the OEQ] on which the VE relied" was sufficient to enable meaningful testing of VE's testimony).

Other courts have determined that it is unnecessary to require disclosure of underlying data where a VE "use[s] proper governmental data and clearly explain[s] her reasoning." *See, e.g.*, *Ronning* v. *Colvin*, No. 13-CV-8194,

2015 WL 1912157, at *9 (N.D. Ill. Apr. 27, 2015). In such cases, a citation to a government publication can be sufficient to permit the claimant, ALJ, or reviewing court to uncover errors in a VE's testimony, even if the underlying data is not actually provided at the hearing. *See, e.g.*, *Farias* v. *Colvin*, 519 F. App'x 439, 440 (9th Cir. 2013) (concluding that VE cited incorrect numbers from BLS data).

The Court need not take a side in this broader debate about "what it means for a VE's step five testimony to be reliable," and doing so would be premature. *Chavez*, 895 F3d at 968. The substantial evidence standard is "extremely flexible" and "gives federal courts the freedom to take a case-specific, comprehensive view of the administrative proceedings." *Brault*, 683 F.3d at 449. The lower courts are working out how that broad standard should apply to forms of evidence that do not implicate the same fundamental concerns as private, undisclosed data. Questions about the necessity and scope of disclosure in those cases therefore should not be resolved by the Court at this early juncture.

* * * * *

To resolve this case, it is enough to hold that an ALJ must provide access to a VE's private data upon the claimant's request. Where the ALJ fails to do so and makes a finding based on secret materials, the ALJ's decision should be set aside for want of substantial evidence. Holding otherwise, as the Sixth Circuit did, would undermine the fairness and integrity of the Social Security system.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 17-1184

In The Supreme Court of the United States

MICHAEL J. BIESTEK,

Petitioner,

v.

NANCY A. BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICI CURIAE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES; AARP & AARP FOUNDATION IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICI CURIAE[1]

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a national membership organization comprising approximately 2,900 individuals, mostly attorneys, who represent individuals applying and appealing claims for Social Security and Supplemental Security Income (SSI) benefits. NOSSCR members include employees of legal services organizations, educational institutions, and other nonprofits; employees of for-profit law firms and other businesses; and individuals in private practice.

NOSSCR members represent Social Security and SSI claimants before the Social Security Administration and in the courts. Approximately 70% of claimants who appeared in disability hearings before administrative law judges in the fiscal year ending September 30, 2017, were represented by attorneys or non-attorney representatives.

NOSSCR has a great interest in ensuring that its members' clients are awarded benefits when they meet the criteria under the Social Security Act and the Commissioner's regulations, and that their clients continue to have due process hearings where the claimants and

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[1] Under Supreme Court Rule 37.6, Amici state that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than Amici or their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Petitioner filed a blanket consent to the filing of amicus briefs. Respondent has consented to Amici filing an amicus brief.

their representatives have the opportunity to engage in relevant cross-examination of vocational experts.

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness. AARP and AARP Foundation support ensuring access to disability benefits under the Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs because older workers with disabilities rely heavily on those benefits to stay out of poverty. Mikki Waid, *Social Security Disability Benefits: A Lifeline for Workers with Disabilities*, Pub. Policy Inst. (Apr. 2015) https://bit.ly/2BZCgIM (last visited Aug. 29, 2018).

SUMMARY OF THE ARGUMENT

This case concerns step five of the five-step sequential evaluation of the adjudication of disability claims under the Social Security Act. At step five, the Commissioner has the burden to provide evidence of jobs that a claimant can perform which exist in

significant numbers in the economy. 42 U.S.C. § 423(d)(2)(A); 20 C.F.R. §§ 404.1566(d); 1560(c)(2) (2018).[2] The vocational expert in this case testified to the existence of work as a sorter and final assembler, relying not only upon the Dictionary of Occupational Titles, but also on her own experience. Biestek asked for the job analysis supporting the vocational expert's testimony. The ALJ stated that she would "not require that." Pet. App. at 119a. Biestek could not examine the foundation of that testimony once the ALJ stated that she would not require production of foundational material. Biestek had no opportunity to identify potential flaws in the analysis and argue to the ALJ that a preponderance of the evidence did not support the expert's opinion. Without access to the basis of the testimony, Biestek also lacked an adequate record upon which to argue on judicial review that the vocational expert's analysis did not support her testimony. Thus the vocational expert's testimony lacked a foundation which a reasonable mind might accept as adequate to support the ALJ's conclusion that there was a significant number of jobs in the economy which Biestek could perform. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Moreover, the Commissioner has made clear that vocational experts should be prepared to cite, explain, and furnish any sources relied upon to support the testimony. Soc. Sec. Admin., *Vocational Expert Handbook* (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf, at 3, 19, 20, 28, 31, 38 (last visited Aug. 29, 2018) (hereafter

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[2] All citations are to the April 1, 2018 20 C.F.R.

"*Handbook*"). The evidentiary standard in *Perales* should apply to vocational expert testimony, and vocational experts should be prepared to explain why the sources which provide the basis for their testimony are reliable. *Id.* at 38.

ARGUMENT

I. Vocational Expert Testimony About the Number of Jobs is Not Consistent or Inherently Reliable, and an Inability to Verify the Basis of Vocational Expert Testimony Would Result in Denial of Meritorious Claims.

The regulations require a five-step sequential evaluation process to resolve disability claims. 20 C.F.R. § 404.1520. Step five consists of two distinct parts: (1) whether a claimant's vocational profile (age, education, work experience, and limitations resulting from physical and mental impairments) allows for the performance of specific jobs in the economy, and (2) whether the jobs identified exist in "significant numbers either in the region where you live or in several regions of the country."[3] 20 C.F.R. § 404.1566(d). The Commissioner has the responsibility "for providing evidence that demonstrates that other work exists in significant numbers in the national economy that you can do." 20 C.F.R. § 404.1560(c)(2). ALJs frequently use

[3] The Commissioner does not define "significant numbers" in the regulation and offers no guidance in any sub-regulatory rulings or manuals.

vocational experts to answer questions about the existence of work and the numbers of jobs. 20 C.F.R. § 404.1566(e).

The Commissioner provides some protection to claimants regarding the first part of step five in Social Security Ruling 00-4p, which places an "affirmative responsibility" on the ALJ "to ask about any possible conflict" between the vocational expert's testimony and the *Dictionary of Occupational Titles* (DOT), U.S. Dep't of Labor, *Dictionary of Occupational Titles* (4th ed. rev. 1991), https://www.oalj.dol.gov/LIBDOT.HTM.[4] If an apparent conflict exists between the expert testimony and the DOT, the ALJ must resolve the conflict and explain in the decision how the conflict was resolved. *Id.* The DOT describes job titles, industry, duties, exertion, education, and training requirements of jobs, but does not provide numbers of jobs in the economy.

The Commissioner's institutional effort to obtain reliable evidence from vocational experts does not extend to vocational expert testimony regarding the numbers of jobs in the economy. *Shaibi v. Berryhill*, 883 F.3d 1102, 1108-09 (9th Cir. 2018) (no *sua sponte* duty

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[4] Social Security Ruling 00-4p recognizes that vocational expert testimony will sometimes conflict with information in the DOT. "Neither the DOT nor the VE [vocational expert] or VS [vocational specialist] evidence automatically 'trumps' when there is a conflict. The adjudicator must resolve the conflict by determining if the explanation given by the VE or VS is reasonable and provides a basis for relying on the VE or VS testimony rather than on the DOT information." SSR 00-4p, 65 Fed. Reg. 75,759 (Dec. 4, 2000). Neither the regulations nor the rulings define the qualifications of a vocational expert.

to resolve conflicts regarding the numbers of jobs in the economy). Vocational expert opinions about numbers of jobs vary widely. In this case, for example, the vocational expert testified that there were 120,000 sorter jobs in the nation.[5] Recent district court cases show that there is no consensus on the number of nut sorter jobs in the national economy. As shown in the table below, vocational experts in other cases have opined that there are as few as 274 nut sorter jobs nationally, and as many as 471,000, with a range of opinions in between.

Number of nut sorter jobs in the national economy	Month and year of vocational expert opinion
274[6]	October/November 2016
5,000[7]	September 2008
16,000[8]	September 2014
26,000[9]	June 2015
40,000[10]	October 2014

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[5] The vocational expert referred to this job as "sorter." Pet. App. at 116a. The DOT code provided corresponds to the title of nut sorter. DOT 521.687-086. The DOT states that a nut sorter "[r]emoves defective nuts and foreign matter from bulk nut meats." *Id.*

[6] *Wood v. Berryhill*, No. 3:17-cv-5430-RJB-BAT, 2017 WL 6419313, at *3 (W.D. Wash. Nov. 17, 2017).

[7] *Binger v. Astrue*, No. EDCV 08-0852-RC, 2009 WL 2848999, at *6 (C.D. Cal. Aug. 31, 2009).

[8] *Wolfanger v. Colvin*, No. 6:16-CV-06688 (MAT), 2018 WL 2425811, at *2 (W.D.N.Y. May 30, 2018).

[9] *Kruppenbacker v. Berryhill*, No. 6:17-CV-06068-MAT, 2017 WL 6275727, at *2 (W.D.N.Y. Dec. 11, 2017).

[10] *Alexander v. Berryhill*, No. 5:16-CV-747-BO, 2017 WL 3624238, at *3 (E.D.N.C. Aug. 23, 2017).

50,000[11]	November 2013
75,000[12]	October 2011
135,000[13]	September 2012
471,000[14]	December 2014

The vocational expert in this case also testified that there were 240,000 final assembler jobs in the nation.[15] Pet. App. at 116a. Recent cases show variable responses for the number of final assembler jobs in the national economy.

Number of final assembler jobs in the national economy	Month and year of vocational expert opinion
4,800[16]	September 2008
6,500[17]	December 2014

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[11] *Flores v. Berryhill*, No. CV H-17-30, 2017 WL 3412163, at *10 (S.D. Tex. Aug. 7, 2017).

[12] *Stone v. Colvin*, No. 1:13CV52/MCR/CAS, 2014 WL 1017929, at *9 (N.D. Fla. Mar. 17, 2014).

[13] *Woodby v. Colvin*, No. CV.A. 1:14-952-RMG, 2015 WL 628482, at *9 (D.S.C. Feb. 12, 2015).

[14] *Mora v. Berryhill*, No. 1:16-CV-01279-SKO, 2018 WL 636923, at *3 (E.D. Cal. Jan. 31, 2018).

[15] The vocational expert referred to the job as "bench assembler," but the DOT code given refers to final assembler, DICOT 713.687-018. According to the DOT, a final assembler "[a]ttaches nose pads and temple pieces to optical frames, using handtools." *Id.*

[16] *Binger*, 2009 WL 2848999, at *6.

[17] *Kotok v. Berryhill*, No. C17-191-BAT, 2017 WL 2859507, at *3 (W.D. Wash. Jul. 5, 2017).

7,000[18]	June 2013
14,000[19]	October 2012
20,000[20]	June 2015
75,000[21]	September 2014
175,000[22]	November 2013
239,500[23]	May 2013
280,160[24]	March 2011

These experts were all asked questions meant to elicit whether there were jobs for a hypothetical claimant, and they all: (a) stated that either nut sorter or final assembler could be performed; and (b) then gave widely disparate answers as to the numbers of jobs available nationally. The answers are not reconcilable through any published data. ALJs have accepted and relied on this evidence to deny claims for benefits. The courts review a small percentage of ALJ decisions and only those where the claimant files a complaint for judicial review of the Commissioner's final decision. The

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[18] *Wilson v. Berryhill*, No. 1:16-CV-01861-SKO, 2018 WL 1425963, at *35 (E.D. Cal. Mar. 22, 2018).

[19] *Razo v. Colvin*, No. 1:14-CV-00945-NYW, 2015 WL 6689400, at *13 (D. Colo. Nov. 3, 2015).

[20] *Kruppenbacker v. Berryhill*, No. 6:17-CV-06068-MAT, 2017 WL 6275727, at *2 (W.D.N.Y. Dec. 11, 2017).

[21] *Davis v. Comm'r of Soc. Sec.*, No. 15-CV-10176, 2015 WL 12683814, at *3 (E.D. Mich. Nov. 19, 2015).

[22] *Flores v. Berryhill*, No. CV H-15-3462, 2017 WL 698528, at *11 (S.D. Tex. Feb. 21, 2017).

[23] *Paul v. Colvin*, No. 3:15CV123/EMT, 2016 WL 1169475, at *6 (N.D. Fla. Mar. 22, 2016).

[24] *Steigerwald v. Comm'r of Soc. Sec.*, No. 1:12 CV 02739, 2013 WL 5330837, at *2 (N.D. Ohio Sept. 23, 2013).

courts do not review favorable decisions where ALJs rely on vocational expert testimony to find that a claimant's impairments preclude the performance of jobs which exist in significant numbers. There may well be many cases where the vocational expert testified to the existence of even fewer numbers of the same jobs and approved the claims.

Claimants should have right to review, comment on, and rebut evidence in administrative hearings, and vocational expert opinions should not be treated differently. The right of claimants to comment on and rebut vocational expert opinions prevents the denial of meritorious claims. An ALJ who relies on vocational expert testimony that there are hundreds of thousands of nut sorter and final assembler jobs may find that there are a significant number of jobs the claimant can perform and deny the claim. However, if the lower estimates of 274 jobs, 5,000 jobs, or even 16,000 jobs in the nation are more accurate, an ALJ may find that the claimant cannot perform a significant number of jobs and award benefits. If a claimant challenges the basis of a vocational expert's opinion, the claimant must be permitted to review the basis of the opinion to ensure that it is reasonably accurate. *See* 5 U.S.C. § 556(d) ("A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.")[25] Without the

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[25] This Court has not decided whether the Administrative Procedure Act generally applies to Social Security hearings. However, in *Perales*, this Court stated that the provisions of 5 U.S.C.

ability to review the basis of the testimony, a claimant cannot present an effective challenge to the vocational expert's opinions. A claimant must be able to meaningfully comment on and rebut a vocational expert's opinion. A "claimant will rarely, if ever, be in a position to anticipate the particular occupations a [vocational expert] might list and the corresponding job numbers to which a [vocational expert] might testify at a hearing." *Shaibi*, 883 F.3d at 1110. The courts must remain cognizant "that the lack of pretrial discovery in Social Security hearings can make the task of cross-examining a [vocational expert] quite difficult." *Britton v. Astrue*, 521 F.3d 799, 804 (7th Cir. 2008).

Requiring vocational experts to produce data on demand serves the interests of both claimants and the Commissioner. Amici recognize that the Social Security Administration has both an interest in ensuring that benefits are paid promptly to those who are entitled to them, and also an interest in protecting the disability trust fund against non-meritorious claims. If data must be available on demand, both claimants and the Commissioner can expect greater reliability from vocational expert testimony, more uniformity in the adjudicative system, and more efficient resolution of conflicts in or questions about the testimony. As the Fourth Circuit explained in *U.S. Steel Min. Co., Inc. v.*

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§ 556(d) were consistent with the Social Security Act. *Perales*, 402 U.S. at 409-10. The APA either applies or informs the principles of administrative notice and rebuttal evidence in Social Security disability claims.

Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor, 187 F.3d 384 (4th Cir. 1999):

> The ALJ's duty to screen evidence for reliability, probativeness, and substantiality similarly ensures that final agency decisions will be based on evidence of requisite quality and quantity. As the Supreme Court has observed, in enacting § 556(d) of the Administrative Procedure Act, "Congress was primarily concerned with the elimination of agency decision-making premised on evidence which was of poor quality-irrelevant, immaterial, unreliable, and nonprobative-and of insufficient quantity." *Steadman v. SEC*, 450 U.S. 91, 102, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981).

Id. at 389.

The requirement to produce the data upon which the vocational expert relied on demand ensures fairness in evaluation of a claimant's questions about vocational expert testimony. While the substantial evidence standard applies to judicial review of Social Security cases, claims at the administrative level before the ALJ are decided based on a preponderance of the evidence. 20 C.F.R. § 404.953(a). If a claimant questions vocational expert testimony, and on production of the vocational expert's data the claimant identifies a flaw in the analysis, the claimant then can point out the flaw to the ALJ and argue that a preponderance of the evidence supports a conclusion that there are not jobs in significant numbers that the claimant can perform. If the ALJ agrees with the claimant, then further

litigation has been prevented, and a deserving claimant has been awarded benefits. If the ALJ does not agree with the claimant, then the ALJ should provide an explanation in the decision. If this explanation satisfies the claimant, or is at least not legally or factually incorrect, litigation may be prevented. If the ALJ does not agree with the claimant's challenge, and the claimant believes the ALJ's decision is not supported by substantial evidence, the record will include the detail necessary for a reviewing court to evaluate the ALJ's decision to rely on the vocational expert's opinion. Requiring vocational experts to produce the foundation and reasoning underlying their opinions on demand and allowing claimants to comment on and rebut those opinions is consistent with principles of reliability, consistency, and fairness which serve the interests of both claimants and the Commissioner.

II. Requiring Vocational Experts to Provide Data Underlying Their Opinions Will Not Unduly Burden the Agency.

The Seventh Circuit's requirement that vocational experts provide the reasoning underlying their opinions on demand does not impose a significant burden on the agency. *McKinnie v. Barnhart*, 368 F.3d 907, 911 (7th Cir. 2004). Social Security published the top ten reasons for remands from District Courts for each year from 2010 through 2017, and no vocational expert

issue appears on any list.[26] Even if the "other" category includes vocational issues, the incidence of vocational expert testimony forming the basis for remand from federal courts is uncommon. The rule that vocational experts be able to produce the basis for their testimony on demand has been the law in the Seventh Circuit for over fifteen years. *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002). Despite the right of claimants to challenge vocational expert testimony at hearings, processing times at hearing offices within the Seventh Circuit generally fall within the average range.[27] There is no evidence that vocational expert challenges have caused any significant delays or increase in litigation.

The Court in *Perales*, 402 U.S. at 406, was concerned with the burden on the Social Security Administration in different circumstances, but those concerns do not apply here. The petitioner in *Perales* objected to four medical opinions and asked the court to require all doctors who provided a written opinion to submit to

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[26] Office of Hearings Operations, Soc. Sec. Admin., *Top 10 Remand Reasons Cited by the Court on Remands to SSA*, https://www.ssa.gov/appeals/DataSets/AC08_Top_10_CR.html (last visited Aug. 29, 2018).

[27] Social Security operates 164 hearing offices. The fastest processing time for offices within the Seventh Circuit is Fort Wayne, IN which ranks 34th, and the slowest is Madison, WI which ranks 133rd. Of the hearing offices within the Seventh Circuit, seven of them are in the top half in processing time (Fort Wayne, IN, Chicago, IL, Evanston, IL, Orland Park, IL, Oak Brook, IL, Peoria, IL, and Evansville, IN). Office of Hearings Operations, Soc. Sec. Admin., https://www.ssa.gov/appeals/DataSets/05_Average_Processing_Time_Report.html (last visited Aug. 29, 2018).

cross-examination. To require the administration to arrange for cross-examination of all doctors whose written opinions are already contained in the record would be a significant administrative burden, and also a financial burden, as the Commissioner would have to pay the doctors to review the files and appear at a hearing.

Requiring vocational experts to cite, explain, and furnish the sources relied upon for their testimony imposes little or no burden on the Commissioner. The vocational expert is either physically present at the hearing, appears by telephone or video teleconferencing, or answers interrogatories.[28] The vocational expert should have the basis of the opinion at the time it is given, so it should not be difficult or time-consuming for the expert to cite, explain, and furnish the sources relied upon for their testimony to a claimant's representative if it is requested. This process would likely prevent rather than cause delays by ensuring that vocational experts are well-prepared and give supportable testimony, and would give greater confidence to ALJs in relying on that testimony at step five. If the basis for vocational expert testimony is available on demand, nearly all questions of reliability could be resolved during or shortly after the hearing.

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[28] In cases where interrogatories are posed after the hearing the responses are proffered to the claimant, the claimant then has "the opportunity to review responses, submit comments or rebuttal evidence, object to questions, or to propose additional questions." *HALLEX*, § I-2-5-30.

The vocational expert in this case stated that some of the information relied upon was from individual labor market surveys and was confidential. The ALJ did not require the vocational expert to provide documentation from the surveys which provided the basis for the opinion. It is not clear from the record that this evidence was confidential, but even if it was confidentiality could readily be preserved by redacting any private information in the documents. Redaction would take little time for vocational experts and would not cause additional cost or delay to the agency.

III. Due Process Concerns in *Perales* Support Petitioner's Position.

The Court held the following in *Perales*:

> We conclude that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.

Perales, 402 U.S. at 402. The circumstances in *Perales* differ from the circumstances in this case in several respects, and those differences support Biestek's position.

The claimant in *Perales* was afforded far greater due process regarding medical opinions than Biestek was afforded in his challenge to vocational expert testimony. In *Perales*, the claimant had access to the medical reports in question well before the hearing; the reports were completed by physicians who had examined the claimant, several of whom were treating physicians retained by the claimant; the reports contained the details of the examinations which provided the bases for the doctors' conclusions; the regulations specifically provided the claimant with the right to request a subpoena, though the claimant did not take advantage of that right; the reports were available to the claimant prior to the hearing, so he had the opportunity to review the evidence in advance and submit rebuttal evidence. *Id.* at 402-06.

Claimants do not have the same protections regarding vocational expert testimony. Claimants cannot anticipate the testimony, review the foundation of the testimony, or submit rebuttal evidence prior to the hearing. *Britton*, 521 F.3d at 804. Under the regulations, claimants do not ordinarily have a right to submit rebuttal evidence following the hearing. 20 C.F.R. § 404.935(a); 20 C.F.R. § 404.949. A claimant must submit written statements to the ALJ "no later than 5 business days before the date set for the hearing,

unless you show that your circumstances meet the conditions described in § 404.935(b)." 20 C.F.R. § 404.949.

Claimants must ask the ALJ for a continuance or supplemental hearing when surprised by evidence adduced at the hearing. *See HALLEX*, § I-2-6-80. Even if a claimant could submit rebuttal evidence, the best the claimant can do is submit competing evidence post-hearing. *Shaibi*, 883 F.3d at 1110. Without knowing the basis for the vocational expert's conclusions, it may be difficult or even impossible to determine whether there are errors underlying those conclusions.

Opinions regarding medical conditions and resulting limitations are very different from opinions regarding work requirements and numbers of jobs in the economy. *Perales* involved conflicting medical opinions concerning the limiting effects of a back injury. The basis of a claimant's impairments is apparent from the results of examinations and the treatment record in the file, but a medical opinion of limitations resulting from those impairments requires professional judgment. While vocational expert testimony can require professional judgment in some cases, the requirements of jobs are factual and should be verifiable to some degree. The number of jobs in the national or regional economy is a statistical fact. It is reasonable to expect vocational experts to produce the data supporting their opinions on request, since the vocational expert should know the basis at the time of the hearing. The Commissioner recognizes this in the *Handbook* by stating that vocational experts "must be prepared to cite, explain, and furnish any sources relied upon in your

testimony." *Handbook*, at 3, 19, 20, 28, 31, 38. This is consistent with the requirement of the APA that a party be entitled to "conduct such cross-examination as may be required for a full and true disclosure of the facts." *See, e.g.*, 5 U.S.C. § 556(d).

The Commissioner makes it clear in the *Handbook* that the information sought by Biestek should be available at the time of the hearing. The Commissioner should not be heard to argue that a requirement for production of the basis for the vocational expert's testimony is unreasonable or burdensome in the context of non-adversarial administrative disability hearings. A vocational expert should be prepared not only to cite, explain, and furnish any sources relied upon but to also explain why those sources are reliable. *Handbook*, at 38. Biestek and other claimants should have the opportunity "to conduct such cross-examination as may be required for a full and true disclosure of the facts." *Perales*, 402 U.S. at 409 (citing 5 U.S.C. § 556(d)).

CONCLUSION

The Court should reverse the judgment of the Sixth Circuit Court of Appeals and rule that substantial evidence standard is offended using undisclosed methods or sources for estimating job numbers.

Respectfully submitted,

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